85-1121

No. 85-_____

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1985

RICHARD A. PLEHN, INC., and RICHARD A. PLEHN,

Petitioners,

v.

IMPERIAL BANCORP and IMPERIAL BANK,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit failed to follow the rule enunciated in *Huddleston v. Dwyer*, 322 U.S. 232 (1944), that, in a diversity action, federal courts must apply state law in accordance with the most recent decision of the highest state court until the case is no longer *sub judice*.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The memorandum of decision of the United States Court of Appeals for the Ninth Circuit (App. A) is not officially reported. Similarly the memorandum of decision of the United States District Court granting summary judgment (App. B) is not officially reported.

JURISDICTION

The memorandum of the Court of Appeals was filed on April 2, 1985. The Order of the Court of Appeals denying a petition for rehearing (App. C) was filed on October 1, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

California Business & Professions Code §10136 provides:

> No person engaged in the business or acting in the capacity of a real estate broker or a real estate salesman within this State shall bring or maintain any action in the courts of this State for the collection of compensation for the performance of any of the acts mentioned in this article without alleging and proving that he was a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose.

STATEMENT OF THE CASE

Petitioners Richard A. Plehn, an individual ("Plehn"), and Richard A. Plehn, Inc., a New York corporation ("Plehn, Inc."), commenced an action against respondents Imperial Bancorp and Imperial Bank (collectively "Imperial"), to recover a percentage commission for obtaining a real estate loan commitment. Plehn is a licensed California real estate broker. Plehn, Inc. is a New York corporation based in New York which holds a valid New York broker's license. Plehn, Inc. is owned entirely by Plehn and was joined as a co-plaintiff because it advanced Plehn's expenses and was to act as his collection agent.

Petitioners allege in their complaint that they entered into an oral contract with Imperial pursuant to which they were to procure a lender and joint venture partner for development of a commercial office building in downtown Los Angeles. Petitioners further allege that they duly performed their obligations under this contract and that Imperial was therefore obligated to pay them a commission equal to one percent of the construction loan funds committed by the joint venture partner ($610,000). Imperial failed and refused to pay any amount whatsoever to petitioners under this agreement. Petitioners allege causes of action for breach of oral contract, quantum meruit, and fraud and seek recovery of $610,000 in compensatory and $1,800,000 in punitive damages. Jurisdiction in the District Court was based upon diversity of citizenship pursuant to 28 U.S.C. §1332(a)(1).

After discovery and pretrial proceedings were completed, Imperial brought a motion for summary judgment in which it argued that neither Plehn nor Plehn, Inc. could maintain suit to recover the commission because Plehn, Inc. was not separately licensed as a real estate broker in California—even though Plehn himself was so licensed. The District Court granted Imperial's motion and the Court of Appeals affirmed.

On March 11, 1985, approximately three weeks before the Court of Appeals issued its memorandum of decision affirming the entry of summary judgment, the California Supreme Court decided *Asdourian v. Araj*, 38 Cal. 3d 276, 696 P. 2d 95, 211 Cal. Rptr. 703 (1985). *Asdourian* controls the key issue on appeal, namely whether under California's doctrine of "substantial compliance" petitioners are entitled to recover for their services notwithstanding their lack of literal compliance with California's real estate licensing statute. The Supreme

Court decision expressly "disapproved" earlier case authority relied upon extensively by Imperial, and completely contradicts the reasoning employed by the Ninth Circuit in affirming the District Court's summary judgment. Petitioners filed a timely petition for rehearing, based on this precedent.

Shortly after the petition for rehearing was filed, the California Supreme Court decided *Tenzer v. Superscope,* 39 Cal. 3d 18, 702 P. 2d 212, 216 Cal. Rptr. 130 (1985), which further invalidated the Ninth Circuit's decision. In *Tenzer,* the California Supreme Court vacated the Court of Appeal's published decision below, which the Ninth Circuit cited and relied upon in affirming the entry of summary judgment. By letter dated August 16, 1985, petitioners brought *Tenzer* to the attention of the Ninth Circuit. Notwithstanding the effect of *Asdourian* and *Tenzer* on the Ninth Circuit's reasoning the petition for rehearing was denied without explanation.

As demonstrated below, the Ninth Circuit's affirmance of the District Court's summary judgment egregiously conflicts with the most recent precedent of the California Supreme Court. Petitioners respectfully submit that this Court should exercise its supervisory power over the Court of Appeals for the Ninth Circuit, directing that Court to reconsider its earlier decision in this case and to apply the rules of law announced in the controlling cases of *Asdourian* and *Tenzer.*

REASONS FOR GRANTING PETITION

1. The Ninth Circuit's Complete Disregard of Controlling California Law Requires this Court to Exercise its Supervisory Power.

Central to federal diversity jurisdiction is the principle that state law controls the substantive rights of the parties. *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938). This Court granted certiorari in *Huddleston v. Dwyer,* 322 U.S. 232 (1944), to enforce the application of this principle under factual circumstances identical to those presented here. In *Huddleston*, the Court of Appeals for the Tenth Circuit affirmed a judgment of the District Court of Oklahoma in a diversity action concluding that the District Court had correctly interpreted and applied then controlling Oklahoma law. Two petitions for rehearing were filed in the Tenth Circuit, the latter of which brought to the attention of the Court a newly issued opinion of the Supreme Court of Oklahoma which was dispositive of the issues on appeal. The Tenth Circuit denied both petitions.

The Supreme Court held that the Tenth Circuit was obligated to consider the recent precedent of Oklahoma's highest court stating:

> State law is the controlling rule of decision in this case as to both substantive and procedural rights of the parties. *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487; Federal Rules of Civil Procedure, rules 69(a), 81(b), 28 U.S.C. following § 723c . . . . It is the duty of the federal appellate courts, as well as the trial court, to ascertain and apply the state law where, as in this case, it controls the decision. *Meredith v. Winter Haven,* 320 U.S. 228, 64

> S.Ct. 7. And a judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones. "Until such time as the case is no longer sub judice, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decisions of the highest state court." *Vandenbark v. Owens-Illinois Co.*, 311 U.S. 538, 543, 61 S.Ct. 347, 350 85 L.Ed. 327.

Id. at 236.

The Supreme Court vacated the judgment below and remanded the case to the Tenth Circuit Court of Appeals instructing it to reconsider its decision in light of the recent opinion of the Oklahoma Supreme Court. *Id.* at 238.

Petitioners seek the same remedy by this petition. The Court of Appeals for the Ninth Circuit disregarded the rules of law announced by the California Supreme Court in *Asdourian v. Araj* and *Tenzer v. Superscope* decided while this case was *sub judice*. As this Court did in *Huddleston*, it should instruct the Ninth Circuit to consider and apply these recent California Supreme Court decisions.[1]

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[1]To grant the relief sought by petitioners this Court is not required to devote substantial time and attention to the underlying issues in this matter. Petitioners submit that if certiorari is granted, this Court may take summary action without receiving additional briefs or hearing oral argument as was practiced in *United States v. Indrelunas*, 411 U.S. 216, 218 (1973). ("Consideration of the petition for certiorari and the response has led us to conclude that further briefs and oral arguments would not materially assist in

2. The Ninth Circuit's Reasoning Affirming the Entry of Summary Judgment Diametrically Conflicts with Controlling California Law.

Under California law a licensing statute "should not be so literally construed as to require exact compliance if it would transform the statute into an unwarranted shield for the avoidance of a just obligation." *In re Estate of Baldwin,* 34 Cal. App. 3d 596, 605, 110 Cal. Rptr. 189 (1973). Where strict application of a licensing statute would otherwise preclude a person from recovering for the fruits of his labor, the doctrine of "substantial compliance" permits recovery in appropriate circumstances. *Asdourian v. Araj,* 38 Cal. 3d 276 (1985). Under this doctrine, the lack of literal compliance with a licensing statute will not defeat an action for recovery of professional services where "the party seeking to escape his obligation has received the full protection which the statute contemplates." *Latipac, Inc. v. Superior Court,* 64 Cal. 2d 278, 411 P. 2d 564, 49 Cal. Rptr. 676 (1966). As shown below, the Ninth Circuit's analysis of the substantial compliance issue in this case is clearly erroneous in light of the California Supreme Court's decision in *Asdourian v. Araj.*

Richard Plehn is a licensed California real estate broker. Plehn wholly owns and controls Plehn, Inc., a corporation which is licensed as a real estate broker in New York but not in California. Early in this litigation, Plehn stated in connection with an issue not relevant here that he "co-brokered the transaction as an individual, along with Plehn, Inc., - New York."[2] Based

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our disposition of the case and, for the reasons hereafter stated, we grant certiorari and reverse the judgment of the Court of Appeals.")

[2]Plehn's February 25, 1983 declaration which contains this averment was submitted by petitioners in opposition to a motion

upon this averment Imperial ultimately brought a motion for summary judgment on the ground that neither Plehn nor Plehn, Inc. could maintain suit for recovery of their brokerage commission due to the operation of California Business and Professions Code §10136[3] since the transaction involved two parties one of whom was unlicensed. Imperial relied principally upon the cases of *General Insurance Company v. Superior Court*, 26 Cal. App. 3d 176, 102 Cal. Rptr. 541 (1972) disapproved in *Asdourian v. Araj*, 38 Cal. 3d 276 (1985) and *Estate of Prieto*, 243 Cal. App. 2d 79, 52 Cal. Rptr. 80 (1966) which are discussed below.

To distinguish the authorities cited by Imperial and demonstrate that the doctrine of substantial compliance was applicable, Plehn stated in a declaration, submitted in opposition to Imperial's summary judgment motion, that notwithstanding the technical posture of the transaction (i.e., "co-brokered" by Plehn and Plehn, Inc.), as a *practical* matter he was the only natural person

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to dismiss brought by Imperial. In its motion, which was denied, Imperial challenged the District Court's diversity jurisdiction on the ground that Plehn, Inc. was a California corporation. In his declaration Plehn discredited Imperial's arguments by showing that he had two separate corporations, one in California and one in New York, and that only the latter was a party to this transaction. Nowhere in this declaration did Plehn address who was physically performing the brokerage services for Imperial, a key factor with respect to the issue of substantial compliance. (See discussion of *Asdourian v. Araj, infra*, at pp. 14-18.)

[3]California Business & Professions Code §10136 provides:

> No person engaged in the business or acting in the capacity of a real estate broker or a real estate salesman within this State shall bring or maintain any action in the courts of this State for the collection of compensation for the performance of any of the acts mentioned in this article without alleging and proving that he was a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose.

who was expending time and energy to find a lender for Imperial's real estate project. The relevant portion of this declaration, dated February 24, 1984, provides:

> My co-plaintiff New York corporation was created to provide a separate entity for employment, record keeping, accounting, pension planning and taxation purposes, and to add a veneer of substance and perpetuity to the activities of an individual. All dealings between plaintiffs and defendants in issue here were between defendants and myself. The oral contract arose out of conversation between Mr. Eltinge and myself; the only personal services rendered for defendants' benefit were my own; and all representations made to plaintiffs in connection with the transaction were made to me. I elected to name the corporation as co-plaintiff because in the transaction with defendants, as in most joint venture transactions, it advanced my expenses and acted as my collection agent. It rendered my statement for services accordingly. In no sense did the corporation render different or separate services to defendants.[4]

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[4]The District Court's decision granting Imperial's motion for summary judgment rested entirely on the Court's rejection of this declaration. The District Court concluded that statements in the declaration conflicted with previous averments made by Plehn and therefore disregarded them as "sham" under the holding in *Radobenko v. Automated Equipment Corporation*, 520 F. 2d 540 (9th Cir. 1975). Petitioners devoted almost half of their opening brief in the Court of Appeals to the argument that Plehn had never contradicted himself and therefore that this key declaration should have been considered by the District Court. The Court of Appeals agreed with petitioners' arguments on this particular issue. As the Court stated in its memorandum:

> The [district] court relied upon *Radobenko v. Auto-*

Under *Schantz v. Ellsworth*, 19 Cal. App. 3d 289, 96 Cal. Rptr. 783 (1971) and *In re Estate of Baldwin*, 34 Cal. App. 3d 596, 110 Cal. Rptr. 189 (1973), California decisions existing at the time Imperial's motion for summary judgment was heard in the District Court, the foregoing facts supported application of the doctrine of substantial compliance. In *Schantz v. Ellsworth*, the Court of Appeal held that a licensed real estate broker was not precluded from maintaining an action to recover a brokerage commission under Business and Professions Code §10136 even though he was not licensed to conduct business under the fictitious name in which he performed the brokerage services. The Court reasoned:

> The purpose of the licensing requirement is to protect the public from the perils incident to dealing with incompetent or untrustworthy real estate practitioners. [Citations omitted.] The statutory purpose, insuring the competency and trustworthiness of real estate practitioners, is satisfied by proof of plaintiff's valid real estate broker's license. It was in connection with the application for and issuance of that license that

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mated Equipment Corp., 520 F.2d 540, 544 (9th Cir. 1975), to reject an affidavit filed in opposition to defendant's motion for summary judgment. It did so because the affidavit contradicted Plehn's earlier testimony in the case. While we disagree with the reliance upon *Radobenko* in resolving the factual dispute we find that of no consequence since it is not disputed on appeal that Richard A. Plehn, Inc. and Richard A. Plehn individually *co-brokered* the transaction.

Court of Appeals Memorandum (App. A, p. A2). In light of the grounds upon which the Ninth Circuit affirmed the summary judgment it must be assumed that the facts set forth in Plehn's February 14, 1984 declaration are material. Therefore, it is unnecessary for petitioners to reiterate their arguments demonstrating that Plehn has never contradicted himself.

> his competency and trustworthiness were examined. [Citations omitted.] Under the statutory scheme, licenses for branch offices and for the use of fictitious names appear to be granted routinely to one who already holds a valid real estate broker's license without further proof of competency or trustworthiness.

Id. at 293.

In *Estate of Baldwin,* the California Court of Appeal applied the rationale of *Schantz v. Ellsworth* in holding that a licensed real estate broker ("Lembi") who performed real estate services through an unlicensed corporation ("Skyline Realty, Inc.") could recover a brokerage commission in spite of Business and Professions Code §10136. Lembi, acting through Skyline Realty, Inc., provided brokerage services in connection with the probate sale of an apartment complex. Certain parties challenged the right of either Lembi or Skyline Realty, Inc. to any portion of the commission on the sale. They argued that the brokerage agreement between Skyline Realty, Inc., and the executors of the estate was void because the corporation was unlicensed.

The court rejected this contention finding the reasoning of *Schantz v. Ellsworth,* to be "particularly appealing here." *Baldwin,* 34 Cal. App. 3d at 605. The Court observed that Lembi was licensed, and further noted that the probate court had expressly found "that the services were performed by Lembi individually" and impliedly found "that Lembi was merely doing business under a fictitious name." *Id.* It therefore upheld the commission award.

In this case, petitioners argued on appeal that *Schantz v. Ellsworth* and *In re Estate of Baldwin* controlled the

licensing issue and required reversal of the District Court's summary judgment. These decisions recognize that the issue of substantial compliance turns on whether the statutory purpose of California's real estate licensing law is satisfied. Petitioners urged that the statutory purpose of "protecting the public from the perils incident to dealing with incompetent or untrustworthy brokers" (*Baldwin*, 34 Cal. App. 3d at 605) was entirely satisfied here because: (1) Plehn had a valid California real estate broker's license; (2) Plehn was the only natural person performing services for Imperial under the commission agreement; and (3) no different services were provided by Plehn, Inc. than those provided by Plehn himself.

Petitioners argued that the circumstances of this case were exactly like those of *Schantz* and *Baldwin* where the unlicensed entities could have obtained licenses "without further proof of competency or trustworthiness." *Schantz*, 19 Cal. App. 3d at 293. Petitioners pointed out that under California's licensing law, Plehn, Inc. could have become a licensed broker upon the payment of a $165 fee and the filing of certain *pro forma* documents with the California Department of Real Estate. California's statutory licensing scheme provides for the routine issuance of a corporate license based upon a license already issued to a corporate officer. The Department of Real Estate conducts no additional inquiry into the qualifications of the corporation to act as a real estate broker. 10 California Administrative Code, Real Estate Commission §§2740, 2742 (App. D).

The Ninth Circuit failed to apply the doctrine of substantial compliance on what can best be considered a purely superficial analysis of the facts. The Court stated:

> Plehn relies upon *In re Estate of Baldwin*, 34 Cal. App. 3d 596, 110 Cal. Rptr. 189, 194 (1973)

> to permit recovery since Plehn individually was a licensed real estate broker in the state of California. We reject his reading of *Estate of Baldwin*. The *Baldwin* decision was based upon the trial court's factual finding that all of the brokerage services were performed by the individual and that the individual "was merely doing business under a fictitious name." 110 Cal. Rptr. at 194. In the present case substantial brokerage services were performed by Richard Plehn, Inc., which did not have a California real estate license. Because the transaction was co-brokered by an unlicensed broker, neither plaintiff can recover. See *Prieto*, 243 Cal. App. 79 [sic].

Court of Appeals Memorandum, p. A2. (App. A)

As the foregoing quotation reveals, the Ninth Circuit seized on Plehn's statement that he acted as a "co-broker" with Plehn, Inc. without considering the practical circumstances of the transaction (discussed by Plehn in his 1984 declaration). The Ninth Circuit stated conclusorily that Plehn, Inc. was performing "substantial brokerage services," without specifically identifying those services. Had the Court attempted to do so it would have been forced to recognize that under the uncontroverted facts of this case the services provided by Plehn, Inc. were exactly the same as the services provided by Plehn himself.

In affirming the District Court's summary judgment, the Ninth Circuit ignored the rationale of *Baldwin* and *Schantz*. In *Baldwin*, the California Court of Appeal could easily have concluded that the doctrine of substantial compliance was inapplicable under the defective reasoning applied here by the Ninth Circuit.

The *Baldwin* court observed that the unlicensed corporation, Skyline Realty, Inc., was the contracting party named in the relevant brokerage documents and thus could have concluded that Skyline Realty, Inc. was performing "substantial brokerage services." Under the Ninth Circuit's reasoning recovery would have been denied. Instead, the *Baldwin* court looked beyond the mere form of the transaction and examined it substantively. The *Baldwin* court took note of the trial court's express finding that "it was through the efforts and by agreement with Mr. Lembi that the [transaction was consummated]." *Id.* at 602. It thus found that the purpose of the licensing statute was satisfied even though, as a matter of form, the services were rendered by the unlicensed corporation.

If any doubt as to the applicability of the substantial compliance doctrine existed in this case under *Baldwin* and *Schantz*, it was laid to rest by the California Supreme Court's decision in *Asdourian v. Araj*, 38 Cal. 3d 276 (1985). *Asdourian*, upon which Plehn's petition for rehearing was based, confirms that the Ninth Circuit's analysis of the substantial compliance issue is erroneous. In *Asdourian* the Supreme Court reaffirmed with force and clarity the rule that lack of literal compliance with a licensing statute will not preclude a party from recovering for services rendered where the legislative purpose of the licensing statute is satisfied. *Asdourian* firmly establishes that Plehn's statement that he "co-brokered" the transaction with Plehn, Inc. is utterly irrelevant with respect to the issue of substantial compliance.

The plaintiff in *Asdourian*, a contractor, performed extensive construction work for the defendant. The plaintiff had obtained a contractor's license in the name

of his business "Artko Remodeling and Construction," but had failed to obtain a license in his own name. The defendant refused to pay for these services arguing that the plaintiff, who had used his own name in the transaction, was not licensed as a contractor under the contractor licensing law (Business & Professions Code §7031) and therefore could not bring suit to recover for his work.

The Supreme Court held that plaintiff could recover for his services under the doctrine of substantial compliance. The Court applied three analytical criteria developed in *Latipac v. Superior Court,* 64 Cal. 2d 278, 411 P.2d 564, 49 Cal. Rptr. 676 (1960), to determine whether the doctrine was applicable namely: "(1) [whether] plaintiff held a valid license at the time of contracting, (2) [whether] plaintiff readily secured a renewal of that license, and (3) [whether] the responsibility and competence of plaintiff's managing officer were officially confirmed throughout the period of performance of the contract." *Asdourian,* 38 Cal. 3d at 284 quoting *Latipac,* 64 Cal. 2d at pp. 281-282.

Under the approach to the issue of substantial compliance mandated by the Supreme Court in *Asdourian,* the legal conclusions of the Ninth Circuit in this case are patently invalid. Application of the *Latipac* factors here reveals that petitioners may invoke the doctrine of substantial compliance.

The first *Latipac* factor is clearly satisfied in this case. Plehn held a valid California real estate brokers license at the time of contracting and indisputably was the *only person* who performed the service of finding a mortgage lender for Imperial's real estate project. As the Court ruled in *Asdourian,* the fact that Plehn, Inc. lacked a separate license in its own name "did not prevent defendant [Imperial] from receiving the full and effective protection of the statute." 38 Cal. 3d at 285.

As in *Asdourian*, the second *Latipac* factor, license renewal, is not relevant here since there was no period during which Plehn himself was not licensed. *Id.*

The third and final *Latipac* factor, "which requires official confirmation of the responsibility and competence of plaintiff's managing officer throughout the period of performance of the contract" (*id.* at 286; quoting *Latipac*, 64 Cal. 2d at p. 282), is clearly satisfied. The Court's discussion of this factor in *Asdourian* is equally applicable in this case:

> Here, the competence and experience of plaintiff Asdourian formed the basis of the license issued to Artko. "(A)ny matters which might form the basis of legitimate inquiry by the licensing board in determining the fitness of [Asdourian] to enjoy a license were 'necessarily considered' and resolved in connection with the issuance of the license to [Artko]." [Citations omitted.]
>
> Issuance of a license to Asdourian in his own name would not have provided defendant with any greater assurances that he was dealing with an experienced and competent contractor. Nor would it have provided any different information concerning the status of solvency of plaintiff's business. The business entity was precisely the same as that to which the license has been issued. The work would have been performed by the same employees, and supervised by the same person. Defendant would have obtained no better protection, and no different performance, had he contracted with Artko.

Asdourian, 38 Cal. 3d at 286.

As evidenced by this language, it is beyond doubt that the California Supreme Court endorses the position petitioners have repeatedly asserted in this case: the fact that Plehn held a valid license and was the *only person* who performed services under the agreement with Imperial warrants application of the substantial compliance doctrine. To use the Court's own words: "[i]ssuance of a license to . . . [Plehn, Inc.] would not have provided defendant[s] with any greater assurances that [they were dealing with an experienced and competent [broker] . . . . The work would have been performed by the same employee, and supervised by the same person." *Id.* Clearly the California Supreme Court would apply the substantial compliance doctrine in this case.

The decision principally relied upon by Imperial, *General Insurance Co. v. Superior Court*, 26 Cal. App. 3d 176, 102 Cal. Rptr. 541 (1972), was disapproved in *Asdourian*. In *General Insurance* the Court of Appeal declined to apply the doctrine of substantial compliance to permit a licensed contractor acting through his unlicensed corporation to recover for work performed. Imperial relied entirely on *General Insurance* to distinguish *Estate of Baldwin*, arguing that in *General Insurance* a licensed individual was rendering services on behalf of an unlicensed corporation, whereas in *Baldwin* the services were rendered on behalf of the individual and "the corporation *was a mere dba or fictitious name for the individual.*" [Appellees' Brief in the Court of Appeal, p. 17 (emphasis by Imperial).]

Petitioners dispute that Skyline Realty Inc. was anything other than a full fledged corporate entity.[5] In

[5]The *Baldwin* opinion refers to the following testimony introduced in the trial court: "the California Corporations Commissioner indicates that there is a California corporation by the name of Skyline Realty, Inc.." 34 Cal. App. 3d at 601.

any event, even if this distinction between *Baldwin* and the present case did exist, it would have no significance. Although the Supreme Court in *Asdourian* recognized that the unlicensed entity in *General Insurance* was a corporation which had "entered into a contract . . . and completed performance," it nevertheless disapproved the holding of the case. *Asdourian,* 38 Cal. 3d at 287. The Supreme Court stated that the *General Insurance* court had improperly relied on the dissent in *Latipac* when it should have followed "the clear rule announced by the majority." *Id.* As the Court stated:

> It has now been almost *five* decades since the doctrine [of substantial compliance] was first applied. The Legislature has manifested no disapproval. In the limited and extraordinary circumstances in which it is applied, the policies underlying the doctrine remain compelling. . . . To the extent that *General Insurance, supra,* 26 Cal. App. 3d 176 rests on the logic of the *Latipac* dissent, it is disapproved.

Asdourian, 38 Cal. 3d at 287-288. Thus the Supreme Court expressly provided that the doctrine of substantial compliance was not foreclosed in *General Insurance* merely because the unlicensed entity was a corporation.

Moreover, the *Latipac* test for substantial compliance is specifically tailored for factual circumstances involving an unlicensed corporation bringing suit to recover for services. The third factor of the *Latipac* test "requires official confirmation of 'the responsibility and competence of plaintiff's *managing officer* . . . throughout the period of performance of the contract.' " *Asdourian,* 211 Cal. Rptr. at 709, quoting *Latipac,* 64 Cal. 2d at p. 282 (empahsis added). Unquestionably the term

"managing officer" pertains to a corporation, not a mere fictitious business name or sole proprietorship. If the Supreme Court in *Asdourian* had meant to preclude application of the doctrine of substantial compliance in cases involving unlicensed corporations, it would *not* have expressly quoted this language from *Latipac*.[6]

Petitioners submit that the California Supreme Court's decision on the licensing issue in *Asdourian* diametrically conflicts with the analysis of the Ninth Circuit in this case. The Ninth Circuit's memorandum of decision instantly reveals that the Court did not consider whether the purpose of California's real estate broker licensing law was satisfied in this case. Rather, the Court denied recovery under the rule of *Estate of Prieto*, 243 Cal. App. 2d 79, 52 Cal. Rptr. 80 (1966), simply because Plehn stated that he "co-brokered" the transaction with his wholly owned corporation, Plehn, Inc. *Estate of Prieto* does not support the Circuit Court's decision in this matter.

In *Estate of Prieto* two separate and *unrelated* parties "were *associated in a joint effort* to effect a lease." *Estate of Prieto*, 243 Cal. App. 2d at 86 (emphasis added). The record contained "no evidence that either of them was a licensed real estate broker during the time in question." *Id.* at 83. It "affirmatively appear[ed]" that one of the parties "was an attorney-at-law and not a

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[6]See also *Knapp Development & Design v. Pal-Mal Properties, Ltd.*, ___ Cal. App. 3d ___, 219 Cal. Rptr. 44 (1985). (Applying *Asdourian v. Araj*, the California Court of Appeal recently held that an unlicensed corporate contractor could maintain an action to foreclose on a mechanics lien where the president and principal shareholder of the corporation held a valid license during the relevant time period.)

licensed real estate broker." *Id.* Under these facts the court understandably denied recovery. The "competence and responsibility" of the attorney to act as a real estate broker had never been confirmed. Therefore, even if the attorney's partner in the transaction ("Dunlevie Associates") held a real estate license (which was not disclosed by the record), it was not apparent that the client received the full protection the licensing statute contemplated. The license of Dunlevie Associates, if it did exist, had no bearing whatosever on the attorney's capabilities as a real estate broker. Unlike the facts of *Asdourian, Baldwin, Schantz* and the case now before this Court, the attorney in *Estate of Prieto* would have been required to take the real estate brokers examination to obtain a valid brokers license.

The Ninth Circuit's conclusion that the rule of *Estate of Prieto* bars application of the doctrine of substantial compliance in this case is erroneous. The issue of substantial compliance was not even addressed in *Estate of Prieto*. Conversely, the substantial compliance doctrine was analyzed extensively and held applicable in *Asdourian, Baldwin* and *Schantz*. These cases would have reached the same result even if the plaintiffs had stated that they acted *jointly* (i.e., "co-brokered") with their unlicensed business entities. The Ninth Circuit ignored the substantive policy concerns of the California legislature and focused only on the form of the transaction. This approach is wholly inconsistent with California law. Petitioners were thus denied fair hearing and disposition of their claims in the Ninth Circuit in derogation of their fundamental right to due process of law guaranteed by the Fifth Amendment. Only this Court can now make a fair hearing possible by remand to the Ninth Circuit with instructions to apply the controlling California precedent discussed herein.

3. The Ninth Circuit Relied on Authority Which Was Vacated While the Petition For Rehearing Was Pending.

The legal basis for the Ninth Circuit's determination that petitioners cannot recover on their claim for fraud is also invalid. The Ninth Circuit cited *Tenzer v. Superscope, Inc.*, 148 Cal. App. 3d 430, 195 Cal. Rptr. 881 (1983) vacated 39 Cal. 3d 18, 216 Cal. Rptr. 130 (1985), for the proposition that "[a] broker may not recover in quantum meruit or on account of fraud when the failure to fulfill a statutory requirement has made recovery under the brokerage contract impossible." Court of Appeals Memorandum, p. A3. The California Court of Appeals' decision in *Tenzer* was vacated by the Supreme Court in *Tenzer v. Superscope, Inc.*, 39 Cal. 3d 18, 216 Cal. Rptr. 130 (1985), decided after petitioners filed their petition for rehearing but *before* it had been acted upon. Petitioners brought the Supreme Court's decision in *Tenzer* to the Ninth Circuit's attention by letter dated August 16, 1985. Under *Tenzer* it is now clear that summary judgment should not have been entered on petitioners' fraud claim.

In *Tenzer* plaintiff brought an action for breach of contract, unjust enrichment and fraud alleging that he was entitled to a real estate commission under an oral agreement to find a purchaser for the defendant's property. The trial court granted defendant's motion for summary judgment on the ground that all of the plaintiff's claims were barred by the statute of frauds. The Court of Appeal affirmed. The Supreme Court reversed, concluding, with respect to the contract and unjust enrichment claims, that plaintiff "had alleged facts sufficient to invoke the estoppel doctrine and thus foreclose Superscope [the defendant] from relying upon the statute of frauds as a defense." *Id.* at 27.

The Supreme Court further held that an action for fraud can be maintained even where the allegedly fraudulent promise is unenforceable as a contract due to the statute of frauds. The Court disapproved the holding to the contrary in *Kroger v. Baur,* 46 Cal. App. 2d 801, 117 P.2d 50 (1941), in which the Court of Appeal stated that maintenance of a fraud claim where an oral contract is unenforceable would nullify the purpose of the statute of frauds. The Court reasoned that recovery in tort for fraud requires more than proof of the elements of a claim for breach of contract:

> Rather, "something more than nonperformance is required to prove the defendant's intent not to perform his promise." (*People v. Ashley* (1954) 42 Cal. 2d 246, 263, 267 P.2d 271; *see also Jacobson v. Mead,* (1936) 12 Cal. App. 2d 75, 82, 55 P.2d 285; *Justheim Petroleum Company v. Hammond* (10th Cir. 1955) 227 F.2d 629, 637; Rest.2d Torts, § 530, com. d.; Prosser, Torts (5th ed. 1984) § 109, p. 764.) To be sure, fraudulent intent must often be established by circumstantial evidence. Prosser, for example, cites cases in which fraudulent intent has been inferred from such circumstances as defendant's insolvency, his hasty repudiation of the promise, his failure even to attempt performance, or his continued assurances after it was clear he would not perform. (Prosser, supra, at pp. 764-765.) However, if plaintiff adduces no further evidence of fraudulent intent than proof of nonperformance of an oral promise, he will never reach a jury. The policies of the statute of frauds will not be subverted by affording plaintiffs

> who can prove actual fraud the opportunity to do so.

Id. at 30-31.

Tenzer confirms that petitioners can recover in fraud regardless of whether they are precluded from recovering their commission under their oral brokerage contract. To recover on their claim for fraud petitioners would be required to prove that Imperial induced them to render valuable services without intending to pay them compensation. *Lesperance v. North American Aviation,* 217 Cal. App. 2d 336, 345, 31 Cal. Rptr. 873 (1963). Petitioners' recovery on this theory would not defeat the purpose of the real estate licensing statute. *Tenzer,* 39 Cal. 3d at 30. The Ninth Circuit's ruling to the contrary was based on invalid authority and is clearly erroneous.

CONCLUSION

This Court should grant the petition for a writ of certiorari and, by summary disposition, remand this action to the Ninth Circuit instructing that Court to consider and apply the legal principles enunciated in *Asdourian v. Araj,* and *Tenzer v. Superscope.*

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

APR -2 1985

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

RICHARD A. PLEHN, INC., and RICHARD A. PLEHN,

Plaintiffs/Appellants,

v.

IMPERIAL BANCORP, and IMPERIAL BANK,

Defendants/Appellees.

CA No. 84-5905

DC No. CV 83-678-RJK (Gx)

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Robert J. Kelleher, District Judge, Presiding

Argued and submitted February 6, 1985

Before: SCHROEDER, FLETCHER, and FARRIS, Circuit Judges.

California Business and Professions Code § 10136 prohibits maintenance of a suit for collection of a real estate commission by Richard A. Plehn, Inc. and Richard A. Plehn, individually as co-brokers, because Richard A. Plehn, Inc. was not a licensed California real estate broker. *In re Estate of Prieto,* 243 Cal. App. 2d 79, 52 Cal. Rptr. 80, 83 (1966).

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*The panel has concluded that the issues presented by this appeal do not meet the standards set by 9th Cir. R. 21 for dispostition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter,* and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

The district court's holding that Richard A. Plehn, Inc. co-brokered the transaction at issue was based upon sworn statements made by Plehn. The court relied upon *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 544 (9th Cir. 1975), to reject an affidavit filed in opposition to defendants' motion for summary judgment. It did so because the affidavit contradicted Plehn's earlier testimony in the case. While we disagree with the reliance upon *Radobenko* in resolving this factual dispute, we find that of no consequence since it is not disputed on appeal that Richard A. Plehn, Inc. and Richard A. Plehn individually *co-brokered* the transaction.

Plehn relies upon *In re Estate of Baldwin*, 34 Cal. App. 3d 596, 110 Cal. Rptr. 189, 194 (1973), to permit recovery since Plehn individually was a licensed real estate broker in the state of California. We reject his reading of *Estate of Baldwin*. The *Baldwin* decision was based upon the trial court's factual finding that all of the brokerage services were performed by the individual and that the individual "was merely doing business under a fictitious name." 110 Cal. Rptr. at 194. In the present case, substantial brokerage services were performed by Richard Plehn, Inc., which did not have a California real estate license. Because the transaction was co-brokered by an unlicensed broker, neither plaintiff can recover. *See Prieto*, 243 Cal. App. 79.

The district court properly held that the finder's exception to the California licensing requirement did not apply. The exception does not apply "[i]f the broker takes any part in the negotiations, no matter how slight," *Rees v. Department of Real Estate*, 76 Cal. App. 3d 286, 295, 142 Cal. Rptr. 789, 795 (1977). It is not disputed that Plehn participated in the financing negotiations.

We also uphold the trial court's denial of recovery under theories of quantum meruit and fraud. A broker may not recover in quantum meruit or on account of fraud when the failure to fulfill a statutory requirement has made recovery under the brokerage contract impossible. *Tenzer v. Superscope, Inc.*, 148 Cal. App. 3d 430, 195 Cal. Rptr. 881 (1983). Under California law, legislatively-imposed requirements on real estate transactions cannot be circumvented by a recasting of the cause of action. *Id.* at 886-87; *see also Keely v. Price*, 27 Cal. App. 3d 209, 103 Cal. Rptr. 531, 535 (1972).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
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CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RICHARD A. PLEHN, INC., a New York corporation; and RICHARD A. PLEHN,

Plaintiffs,

v.

IMPERIAL BANCORP, a California corporation; and IMPERIAL BANK, a California corporation,

Defendants.

No. CV 83-0678-RJK (Gx)

MEMORANDUM OF DECISION AND ORDER

The Court presently has before it defendants' motion for summary judgment. The motion came on for hearing on March 5, 1984 and was taken under submission. Having read and carefully considered the moving papers and the opposition filed in response thereto, and having heard oral argument, the Court grants defendants' motion for summary judgment.

Plaintiff Richard Plehn was issued a broker's license by the California Department of Real Estate on November 11, 1980 and was at all times thereafter a real estate broker licensed by the State of California. Plaintiff Richard Plehn, Inc. is a New York corporation. Richard Plehn, Inc. has never obtained a valid California broker's license. Richard Plehn is the president, treasurer and sole stockholder of Richard Plehn, Inc.

Defendants Imperial Bancorp and Imperial Bank are California corporations with headquarters in Los Angeles, California. On June 28, 1983, defendants

acquired a 99-year lease on a parcel of real property located in Los Angeles, and thereafter entered into a contract to purchase the site in fee.

Plaintiffs claim that they made an oral brokerage agreement with defendants in Los Angeles in September or October, 1980 whereby plaintiffs undertook to provide financing for a building project contemplated by the defendants and Metropolitan Life Insurance Company on the parcel of real property in exchange for a commission. The plaintiffs concede that any agreement made with defendants in connection with the proposed joint venture and mortgage loan financing was made by Richard Plehn and Richard Plehn, Inc. jointly.

In connection with the proposed transaction between defendants and Metropolitan Life Insurance Company, plaintiffs participated in meetings between defendants and Metropolitan and participated in negotiating the terms of the proposed financing agreement.

Both the individual and corporate plaintiff have brought suit to recover commissions allegedly due from defendants as a result of the oral brokerage agreement. There is no dispute that the individual plaintiff is a licensed broker. There is also no dispute that the corporate plaintiff is not a licensed broker in the State of California.

Cal. Bus. & Prof. Code Section 10136 provides that no person acting as a broker can maintain an action for the collection of any compensation earned as a result without being licensed. A corporation is deemed to be a "person" for purposes of section 10136. *See In re Estate of Baldwin*, 34 Cal. App. 3d 596, 604, 110 Cal. Rptr. 189, 194 (1973). Thus, since Richard Plehn, Inc. is not licensed broker, it cannot maintain an action for the commissions allegedly due from defendants.

California, however, does not require a "finder" to be licensed to recover commissions for helping parties find each other. *Tenzer v. Superscope, Inc.*, 148 Cal. App. 3d 430, 440, 195 Cal. Rptr. 881, 886 (1983). In *Tyrone v. Kelly*, 9 Cal. 3d 1, 8, 11-12, 507 P.2d 65, 68, 106 Cal. Rptr. 761, 765 (1973), the court held that the test of whether a person is a broker or a finder is whether the person merely brings the parties together or also goes further and helps to conclude the transaction and negotiates to compromise any differences between the parties. If the person goes beyond merely introducing the parties, no matter how insignificant the further action, the person is deemed to be a broker and must be licensed to recover any compensation or commissions. *Id.* at 8, 507 P.2d at 68.

In this case, the plaintiffs did much more than bring the parties together; they negotiated and helped to compromise the differences between the defendants and the financier of the project, Metropolitan. By plaintiffs' own admissions in answers to interrogatories, the plaintiffs were "active participants in the many meetings between Metropolitan Life Insurance Company and the defendants" and "assisted in negotiating the terms of such joint venture." Thus, the Court concludes that the plaintiffs did more than merely help the parties find each other; they acted as brokers and must be licensed to recover. *Tyrone*, 9 Cal. 3d at 11-12, 507 P.2d at 68.

In opposition to the defendants' motion, the plaintiffs argue that the corporate plaintiff was nothing more than a shell; a corporation set up for tax, pension and accounting purposes. As such, plaintiffs argue that Richard Plehn rendered all of the services in his individual capacity, thus making the corporate plaintiff an unlicensed finder. Plaintiffs have submitted a

declaration of Richard Plehn wherein he avers that at all times he was acting in his individual capacity, making it Richard Plehn the individual who conducted all of the negotiations between Metropolitan and defendants. However, in deposition testimony in late 1983, Richard Plehn averred that the corporation did *not* render any services separate from those tendered by the individual plaintiff. Moreover, Richard Plehn averred that "Richard A. Plehn, Inc. did all the work" and that "it [Richard Plehn, Inc.] did it all in its offices in New York." Richard Plehn is trying to create a triable issue of fact as to which capacity he was acting in when he conducted the negotiations, thereby making summary judgment for defendants inappropriate. A party opposing a motion for summary judgment cannot create a triable issue of fact, however, merely by contradicting earlier sworn deposition testimony. *Radobenko v. Automated Equipment Corporation,* 520 F.2d 540, 544 (9th Cir. 1975).

The Court notes that the distinction of which capacity Richard Plehn was acting in is crucial to the plaintiffs' lawsuit. If Richard Plehn was acting in his individual capacity, then the corporate plaintiff could reasonably be deemed to be a mere finder. If, on the other hand, he was acting on behalf of the corporation, the corporation was acting not as a finder but as a broker and must be licensed to recover any commissions. *See* Cal. Bus. & Prof. Code Section 10136 This Court finds that under *Radobenko*, Richard Plehn is bound to his initial deposition testimony that he was acting on behalf of, and jointly with, the corporation.

This Court finds that the corporation, acting through Richard Plehn, its president and sole shareholder, participated in negotiations and attempted to compro-

mise the parties. The corporation cannot be deemed to be a mere finder but was acting as a broker. Accordingly, the unlicensed corporate plaintiff cannot recover any of the commissions sought and defendants are entitled to summary judgment against Richard A. Plehn, Inc.

Defendants next contend that if one party to a brokerage agreement, here the corporation, is not licensed and cannot recover, then co-broker Richard Plehn also cannot recover. In *In re Guardianship of Estate of Prieto,* 243 Cal. App. 2d 79, 52 Cal. Rptr. 80 (1966), the court found that a licensed co-broker could not recover commissions under a brokerage agreement because the other broker was not licensed. The court stated:

> An agreement employing a person to act as a real estate broker who is not licensed as such is illegal, void and unenforceable. The assumed services in effecting the subject lease *being the product of the joint effort of both respondents,* the illegality attendant upon Therieau's participation because he was not a licensed broker, *invalidates the whole transaction, and forecloses recovery by either of them* [including the licensed co-broker].

243 Cal. App. 2d at 86, 52 Cal. Rptr. at 84 (emphasis added). Though the plaintiffs now claim that the services were not rendered by both the corporation and the individual but rather by the individual only, plaintiff Richard Plehn earlier claimed that he was acting on behalf of the corporation. As noted, plaintiffs are bound by the deposition testimony of Richard Plehn to the effect that he rendered services on behalf of, and with, the corporation. *Radobenko v. Automated Equipment Corporation,* 520 F.2d at 544. Thus, contrary to the

assertions of plaintiffs, the services were the "joint effort of both" plaintiffs, *Estate of Prieto,* 243 Cal. App. 2d at 86, 52 Cal. Rptr. at 84, and neither is entitled to recover commissions from defendants.

Plaintiffs rely heavily on the case of *Schantz v. Ellsworth,* 19 Cal. App. 3d 289, 96 Cal. Rptr. 783 (1971), in support of their contention that even if the corporate plaintiff cannot recover for commissions, the individual plaintiff still can. In *Schantz,* the court found that a licensed individual, doing business under a fictitious business name, could recover commissions even though the business entity was not licensed. The court noted that Cal. Bus. & Prof. Code Section 10136 was unclear as to whether an individual, already licensed, doing business under an unlicensed fictitious business name, was prohibited from recovering commissions. The court concluded that the individual broker had already proved his trustworthiness and competence and once this was proved, a license to the fictitious entity was "routinely granted." *Id.* at 293, 96 Cal. Rptr. at 785. Thus, the concern of the statute in allowing recovery for commissions only for trustworthy and competent persons was satisfied as a result of the individual being licensed, and the issuance of a license to the corporation would in no way further trustworthiness or competence. *Id. See also Estate of Baldwin,* 34 Cal. App. 3d 596, 606, 110 Cal. Rptr. 189, 194 (1973) (purposes of statute are satisifed when individual doing business under fictitious business entity is licensed even though business entity is not).

The plaintiffs basically rely on the rationale and holding of *Schantz,* arguing that they substantially complied with the requirements of the statute as did the plaintiff in *Schantz.* However, in *Schantz,* the court made the specific finding that the individual broker there

had rendered the services and there was absolutely no indication that the business entity had rendered any of the brokerage services. In this case, however, the plaintiff individual acted on behalf of the corporation and for himself. Thus, this case falls squarely within the holding in *Estate of Prieto,* 243 Cal. App. 2d 79, 52 Cal. Rptr. 80.

Defendants argue that section 10136 is considered to be analogous to Bus. & Prof. Code Section 7031. Section 7031 provides for the licensing of contractors and prohibits any recovery for unlicensed contractors. In *General Insurance Company v. Superior Court,* 26 Cal. App. 3d 176, 102 Cal. Rptr. 541 (1972), the court considered an identical factual situation involving the contractor's licensing statute. There, a suit was filed for recovery of sums allegedly due to an unlicensed corporate contractor. The plaintiff admitted that the corporation was unlicensed.

In language virtually identical to section 10136, section 7031 prohibits an unlicensed person from bringing or maintaining an action for recovery of compensation for performance of acts for which a contractor's license was required. Regardless of section 7031, the plaintiff argued that though the corporation could not recover, the individual should be able to because the purpose of the statute would still be satisifed. The court noted that "applied literally, the language of Section 7031 would preclude plaintiff from maintaining the action," *id.* at 179, 102 Cal. Rptr. at 543, and then considered the plaintiff's claim that he had substantially complied with the contractor licensing requirements. The court concluded:

> Section 7031 represents a legislative determination that the importance of deterring unli-

> censed persons from engaging in the contracting business outweighs any harshness between the parties and that such deterrence can be realized by denying violators the right to maintain any action for compensation in the courts of the state.

Id. at 183, 102 Cal. Rptr. at 546. The court then applied this principle holding that the individual licensed plaintiff could not recover even though he had substantially complied with the licensing statute. The court rejected the argument that the court could under considerations of equity, award the plaintiff compensation regardless of Section 7031. *Id.*

In *Schantz*, 19 Cal. App. 3d at 293, 96 Cal. Rptr. at 785, the court noted the similarities in purpose and effect between sections 10136 and 7031. Defendants argue that the *General Insurance* case forecloses application of plaintiff's substantial compliance theory in brokerage license cases also. In *Estate of Baldwin*, 34 Cal. App. 3d 596, 110 Cal. Rptr. 189 (1973), decided after *General Insurance*, the court discussed *General Insurance*, saying:

> Notwithstanding the integrity of [*General Insurance*] as applied to corporate *contractors*, the argument ignores the probate court's express finding that the services were performed by Lembi individually and its implied finding that Lembi was merely doing business under a fictitious name.

Id. at 605, 110 Cal. Rptr. at 194. Thus, contrary to the assertions of defendants, *General Insurance* does not automatically foreclose plaintiffs' substantial compliance argument in brokerage licensing cases.

In *Estate of Baldwin,* the licensed individual and the unlicensed corporate plaintiff brough suit to recover brokerage commissions. The corporate plaintiff was foreclosed from recovering commissions under section 10136. 34 Cal. App. 3d at 604, 110 Cal. Rptr. at 194. The court then discussed both the *Schantz* and *General Insurance* cases. The court rejected the holding in *General Insurance*, however, only because it "ignore[d] the . . . court's express finding that the services were performed by Lembi individually and that Lembi was merely doing business under a fictitious name." *Id.* at 605, 110 Cal. Rptr. at 194. In *Schantz* and *Baldwin,* the court allowed recovery to a licensed broker regardless of the unlicensed corporate broker where *the individual* rendered the services but conducted those services under a fictitious business entity. *See Schantz,* 19 Cal. App. 3d at 290-91, 96 Cal. Rptr. 784; *Baldwin,* 34 Cal. App. 3d at 603-06, 100 Cal. Rptr. at 194-95.

In this case, however, Richard Plehn, Inc. rendered services to defendants. Here, by plaintiffs' own admissions, Richard Plehn was not rendering services under the name Richard A. Plehn, Inc.; Richard A. Plehn, Inc. *was rendering brokerage services* through Richard Plehn. Thus, this case falls squarely within the holding of *Estate of Prieto,* 243 Cal. App. 2d 79, 52 Cal. Rptr. 80. Both plaintiffs are foreclosed from recovering commissions allegedly due from defendants.

Finally, the plaintiffs assert causes of action for quantum meruit and fraud. It is clearly established in California that a broker cannot recover in quantum meruit or fraud when a statutory requirement has not been fulfilled making recovery under the brokerage contract impossible. *See Tenzer v. Superscope, Inc.,* 148 Cal. App. 3d 430, 195 Cal. Rptr. 881 (1983) (holding

that a broker could not recover in quantum meruit after brokerage contract was unenforceable due to failure to satisfy statute of frauds). Any other result would allow a contractor to recover the commission under a quantum meruit theory even though unlicensed in clear violation of section 10136. A similar analysis applies to the fraud cause of action. If plaintiff is allowed to sue for damages for fraudulent representation, the purpose of Section 10136 would be completely undermined.

Plaintiffs claim, however, they can allege a cause of action for quantum meruit and fraud without establishing the validity of the brokerage agreement. This exact argument has been rejected by the California courts. *See Tenzer,* 148 Cal. App. 3d at 440-41, 196 Cal. Rptr. at 886-87. As in *Tenzer,* the plaintiffs here can only establish the fraudulent promises and the right to recover in quantum meruit by reference to and reliance on the brokerage agreement which this Court has found to be unenforceable. Thus, plaintiffs are precluded from both bringing the quantum meruit and fraud claims.

The Court concludes that each of plaintiffs' causes of action cannot be maintained by the plaintiffs, and thus the defendants are entitled to summary judgment. Judgment shall be entered accordingly.

The Clerk shall send, by United States mail, a copy of this Memorandum of Decision and Order to counsel for the parties.

DATED: April 26, 1984.

Robert J. Kelleher

ROBERT J. KELLEHER

Senior District Judge

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APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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CLERK, U.S. COURT OF APPEALS

RICHARD A. PLEHN, INC., and RICHARD A. PLEHN Plaintiffs/Appellants, v. IMPERIAL BANCORP, and IMPERIAL BANK, Defendants/Appellees.	CA No. 84-5905 DC No. CV 83-678-RJK (Gx) **ORDER**

Before: SCHROEDER, FLETCHER, and FARRIS, Circuit Judges.

The answer to the petition for rehearing and reply to the answer heretofore lodged with the court are ordered filed.

The petition for rehearing is denied.

PETTIT & MARTIN

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APPENDIX D

The following provisions appear in Title 10 California Administrative Code, Real Estate Commissioner, Article 6. "Corporate Licenses:"

2740. Broker Officers and Salespersons.

Acts for which a real estate license is required may be conducted in the name of a corporation licensed as a real estate broker only by officers of the corporation licensed under Section 10158 or 10211 or by salespersons employed by the corporation and supervised by an officer licensed under Section 10158 or 10211. No acts for which a real estate license is required may be performed for, or in the name of, a corporation when there is no officer of the corporation licensed under Section 10158 or 10211.

2742. Certificate of Status, Qualifications or Good Standing.

(a) An applicant for an original broker license for a domestic corporation shall submit with the application, a Certificate of Status (Domestic Corporation) executed by the California Secretary of State not earlier than 30 days before the date of mailing or delivering the application to the headquarters office of the Department.

(b) An applicant for an original broker license for a foreign corporation shall submit with the application, a Certificate of Qualification or a Certificate of Good Standing (Foreign Corporation) executed by the California Secretary of State not earlier than 30 days before the date of mailing or delivering the application to the headquarters office of the Department.

NOTE: Authority cited: Section 10080, Business and Professions Code. Reference: Sections 10158 and 10211, Business and Professions Code.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on December 30, 1985, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Richards, Watson, Dreyfuss
& Gershon
Glenn Watson, Esq.
333 S. Hope Street
38th Floor
Los Angeles, California 90071

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 30, 1985, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)

Supreme Court, U.S.
FILED
JAN 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1121

In the Supreme Court of the United States

October Term, 1985

RICHARD A. PLEHN, INC., and RICHARD A. PLEHN,

Petitioners,

v.

IMPERIAL BANCORP and IMPERIAL BANK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit correctly rejected petitioners' contention that recent cases overruled the well-established California statutory and case law that governs the facts of this case.

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I

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STATUTES INVOLVED IN THE CASE

California Business and Professions Code §10136:

> No person engaged in the business or acting in the capacity of a real estate broker or a real estate salesman within this State shall bring or maintain any action in the courts of this State for the collection of compensation for the performance of any of the acts mentioned in this article without alleging and proving that he was a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose.

California Business and Professions Code §10139:

> Any person acting as a real estate broker or real estate salesman without a license or who advertises using words indicating that he is a real estate broker without being so licensed shall, upon conviction thereof, if a natural person, be punished by a fine of not to exceed one thousand dollars ($1,000), or by imprisonment in the county jail for a term not to exceed six months, or by both such fine and imprisonment in the discretion of the court; or if a corporation, be punished by a fine of not to exceed ten thousand dollars ($10,000).

California Business and Professions Code §10151.5 (operative July 1, 1985):

> (a) An applicant who is not a resident of this state shall be eligible for a real estate license provided (1) the applicant qualifies for licensure under the provisions of this chapter, including Section 10162, and (2) the state or other

jurisdiction which is the place of residence of the applicant permits a resident of California to qualify for and obtain a real estate license in that jurisdiction.

(b) A foreign corporation shall be exempt from the eligibility requirement set forth in clause (2) of subdivision (a) if, and for so long as, at least one of the officers of the corporation who is designated and licensed as a real estate broker pursuant to Section 10158 or 10211 is a resident of this state.

(c) Every nonresident applicant for a real estate license shall, along with his or her application, file with the Real Estate Commissioner an irrevocable consent that if in any action commenced against him or her in this state, personal service of process upon him or her cannot be made in this state after the exercise of due diligence, a valid service may thereupon be made upon the applicant by delivering the process to the Secretary of State.

(d) Insofar as possible, the provisions of Section 1018 of the Code of Civil Procedure relating to service of process on the Secretary of State are applicable to this section.

California Business and Professions Code §10157:

No real estate license gives authority to do any act specified in this chapter to any person, other than the person to whom the license is issued.

California Business and Professions Code §10162:

Every licensed real estate broker shall have and maintain a definite place of business in the State of California which shall serve as his office for

the transaction of business. This office shall be the place where his license is displayed and where personal consultations wtih clients are held.

No real estate license authorizes the licensee to do business except from the location stipulated in the real estate license as issued or as altered pursuant to Section 10161.8.

California Business and Professions Code §10211:

If the licensee is a corporation, the license issued to it entitles one officer thereof, on behalf of the corporation, to engage in the business of real estate broker without the payment of any further fee, such officer to be designated in the application of the corporation for a license. For each officer other than the officer so designated, through whom it engages in the business of real estate broker, the appropriate original or renewal fee is to be paid in addition to the fee paid by the corporation.

Other statutes cited are set forth in Appendix B.

No. 85-1121

In the Supreme Court of the United States

October Term, 1985

RICHARD A. PLEHN, INC., and RICHARD A. PLEHN,

Petitioners,

v.

IMPERIAL BANCORP and IMPERIAL BANK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE[1]

This is an action by petitioners to recover a real estate brokers' commission. California law requires real estate

[1]Petitioners base the "facts" set forth in their statement of the case on the allegations of the complaint. However, inasmuch as the case was decided by summary judgment on the evidence, petitioners cannot rely at this point on what they alleged in the complaint, but must rely on the facts as found by the court on the evidence.

brokers to be licensed, provides that acting as a broker without a California license is a criminal offense, and prohibits any action for collection of compensation by an unlicensed person. Petitioner Richard A. Plehn, individually, ("individual petitioner") is licensed. (ER t* p. 5, l. 5-6).[2] The other petitioner, Richard A. Plehn, Inc. ("corporate petitioner") is a New York corporation, does not hold a California real estate broker's license, operates in all its California dealings out of its New York office, sends and receives all its correspondence at its New York office, and does not maintain any place of business in California. (ER t* p. 5, l. 6-8; CR d 10, p. 13, l. 11-21; Supp. ER p. 13, l. 11-21). The individual and corporate petitioners, jointly, acting as "co-brokers", engaged in brokerage activities in seeking to obtain real estate financing from Metropolitan Life Insurance Company ("Metropolitan") for respondents for a proposed building project. (ER, tl, p.2, line 9 to page 3, line 5; ER, t32, last exhibit, page 9, lines 12-22.) Some of the brokers' services which form the basis of the present lawsuit were performed by at least one other officer of said corporation. (CR, D 10, Tab 10, p. 31). The negotiations subsequently broke down. The financing was never furnished. The building was never built. (ER, t*, p.4, lines 11-24.)

Before the negotiations between respondents and Metropolitan broke down, petitioners participated in those negotiations. However, petitioners did not introduce respondents to Metropolitan, inasmuch as respondents and Metropolitan had previously discussed financing the proposed project in a meeting arranged through another mortgage broker. (ER, t*. p.3, lines 18-21; ER, t32, p.55, line 16 to p.56, line 18; exhibit 101.)

Following the collapse of the negotiations, petitioners sent respondents a statement claiming a commission in connection

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[2]References to "ER t" are to the excerpt of record and tab number indicated. All references to the supplemental excerpt are designated as "Supp. ER", and all references to the clerk's record are designated as "CR".

with the defunct project (ER, t*, p.4, line 25, to p.5, line 2.) This statement was sent both on behalf of the individual petitioner and on behalf of the corporate petitioner as a corporation (CR, d10, p.13, line 27, to page 14, line 3; Supp.ER, p.13, line 27, to p.14, line 3), and the statement rendered requested that the commission be made payable to the corporate petitioner in New York. (CR, d10, p.18; Supp.ER, p.18).

The petitioners, disregarding the illegality of their brokerage agreement and the proscription of the licensing statute, sued for compensation. The district court, after completion of discovery, granted respondents' motion for summary judgment on the basis of California law. The Court of Appeals for the Ninth Circuit in an unpublished opinion affirmed the judgment of the district court. Petitioners now seek a writ of certiorari, asserting that the court of appeals disregarded, and that its opinion conflicts with, California law.

In arguing that the court of appeals did not consider California law, petitioners fail to mention that the two California Supreme Court decisions that petitioners now urge upon this court, were fully argued to the court of appeals in connection with a petition for rehearing before that court. In order that this Court may be aware of the consideration by that court of the very issues which petitioners now bring to this Court, we attach in Appendix A: the Petition For Rehearing (By Panel), the respondents' Motion for Leave to File Answer to Petition For Rehearing; Memorandum of Points and Authorities and Declaration of Glenn R. Watson In Support of Motion; the respondents' Answer to Petition For Rehearing; petitioners' Notice of Motion and Motion to File Reply to Defendants' Answer to Petition For Rehearing; Memorandum of Points and Authorities and Declaration of Robert P. Mallory In Support Thereof; Reply to Defendants' Answer; Petitioners' counsels' letter to Clerk, United States Court of Appeals, dated August 16, 1985 and respondents' counsel's letter to the Acting Clerk, United States Court of Appeals, dated September 11, 1985.

Inspection of the 47 pages of Appendix A hereto will disclose that the petitioners' contentions made in the instant petition for certiorari were fully ventilated before the court of appeals. That court then denied the petition for rehearing on October 1, 1985. Still dissatisfied, petitioners have filed the instant petition for writ of certiorari rearguing the same issues.

In their statement of the case petitioners assert that the corporate petitioner "was joined as a co-plaintiff because it advanced Plehn's expenses and was to act as his collection agent." (p.2). This is contrary to the factual determinations in the lower courts. In fact, based on uncontradicted evidence, the district court found that petitioner Plehn himself "averred that 'Richard A. Plehn, Inc. did all the work' and that 'it [Richard A. Plehn, Inc.] did it all in its offices in New York.' " (Appendix to Petition, B4). The court of appeals re-examined this question, and while it disagreed with the trial court's reliance on *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, (9th Cir. 1975), stated that "[w]e find that of no consequence since it is not disputed on appeal that Richard A. Plehn, Inc. and Richard A. Plehn individually *co-brokered* the transaction." (Emphasis the court's). In light of the lower court's disposition of this question, petitioners' current characterization of the corporate petitioner as merely a "collection agent" for the individual petitioner must be disregarded. Indeed, in the very next paragraph of the petition for certiorari petitioners concede that "*they* [both petitioners] entered into an oral [brokerage] contract" with respondents.[3]

Petitioners assert in their statement of the case that the California Supreme Court's decision in *Asdourian v. Araj*, 38 Cal.3d 276, 696 P.2d 95, 211 Cal.Rptr. 703 (1985) contradicts the Ninth Circuit's opinion. Respondents' Answer to Petition For Rehearing (Appendix, A 24) demonstrated to the Ninth Circuit that that decision of the California court was clearly distinguishable and did not change the California

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[3]Except where otherwise stated, all emphasis herein has been added.

law as determined and applied by the Ninth Circuit. The court agreed and denied the petition for rehearing. We will discuss the *Asdourian* case, *infra*. (See Point II.)

Petitioners also assert, incorrectly, that the California Supreme Court's decision in *Tenzer v. Superscope*, 39 Cal.3d 18, 702 P.2d 212, 216 Cal.Rptr. 130 (1985) "invalidated the Ninth Circuit's decision". As we show *infra* (see Point III) *Tenzer* has nothing whatever to do with the California law proscribing suits for recovery of compensation for unlicensed and illegal broker activities. The inapplicability of *Tenzer* was also demonstrated to the Ninth Circuit by respondents' counsels' letter to the court dated September 11, 1985 (Appendix, A 46), before the court of appeals denied the petition for rehearing.

SUMMARY OF ARGUMENT

The United States Supreme Court ordinarily accepts the determination of questions of state law by the intermediate federal courts, and will not review them except in exceptional cases. Unless the court of appeals decision can be shown to be clearly wrong, if there is lack of clarity as to the state law, the Supreme Court normally leaves the resolution of such matters to the highest state court.

Petitioners' argument that the court of appeals disregarded controlling California law is simply wrong. The court of appeals decision was grounded on well-established California statutory and case law that an agreement by an unlicensed person to perform real estate brokerage services is illegal and cannot be the basis of a suit to recover compensation. And where there is a single brokerage agreement for the services of both a licensed broker and an unlicensed person, the agreement is entirely void and unenforceable and neither party can recover on it. Petitioners do not take issue with these principles, but seek to evade them through misapplication and "stretching" of the limited doctrine of substantial compliance beyond that permitted by California law.

Petitioners misread and seek to misapply the California Supreme Court opinion in *Asdourian v. Araj*. That case held that the plaintiff substantially complied with the licensing law where the individual plaintiff held his license in the name under which he did business as a sole proprietorship, and plaintiff and the licensee were in fact the same person or entity. That case does not detract from long established California statutory and case holding that an unlicensed corporation cannot recover on a contract requiring a license, even though an officer of the corporation holds an individual license. California cases hold that the statute and strong public policy of California to protect the public through enforcement of the licensure laws precludes recovery by the unlicensed corporation in such cases.

The court of appeals followed established California law with respect to the limited substantial compliance doctrine and did not err in rejecting petitioners' arguments as to the reading and application of *Asdourian v. Araj, supra,* and *In Re Estate of Baldwin*, 34 Cal.App.2d 596, 110 Cal.Rptr. 189 (1973).

The court of appeals correctly held that under California law petitioners could not circumvent the statutory prohibition against recovery of compensation by an unlicensed broker by recasting the claim into alternative counts of *quantum meruit* or fraud. The recent decision in *Tenzer v. Superscope, supra,* does not change that rule and petitioners' arguments concerning the same were correctly rejected by the court of appeals.

The petition for writ of certiorari is not well taken and should be denied.

I

THE DECISION OF THE COURT OF APPEALS HEREIN WAS GROUNDED ON WELL-ESTABLISHED CALIFORNIA LAW, AND DOES NOT CONFLICT WITH THE CASES RELIED ON BY PETITIONERS IN THEIR PETITION FOR CERTIORARI. IN ADDITION, THE COURT OF APPEALS HAD THOSE CASES BEFORE IT, AS WELL AS THE ARGUMENTS OF BOTH SIDES CONCERNING THE SAME, BEFORE ITS FINAL DISPOSITION OF THIS CASE. THE PRESENT CASE DOES NOT PRESENT ANY OF THE CIRCUMSTANCES WHICH WOULD WARRANT CERTIORARI.

It is of course basic that, in order to warrant review by certiorari in a diversity case, the decision of the intermediate federal court must be in clear conflict with the decisions of the state court of last resort. Rule 17 of the Rules of the Supreme Court; *Huddleston v. Dwyer,* 322 U.S. 232 (1944). The Supreme Court will in fact ordinarily accept, and therefore not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts. (*Id.* at 237). As we show *infra,* the court of appeals decision herein was in full accord with California law.

Petitioners herein rely on *Asdourian v. Araj*, 38 Cal.3d 276, 696 P.2d 95, 211 Cal.Rptr. 703 (1985), as having allegedly overruled the law of California that is applicable to the present case. Far from overruling those principles, *Asdourian* in fact reaffirmed them. This is shown in detail *infra* (see Point II).

The court of appeals had the *Asdourian* opinion, and the arguments of both sides concerning the same, before it for some time before its final ruling.

Petitioners also rely on *Tenzer v. Superscope, Inc.*, 39 Cal.3d 18, ___ P.2d ___, ___ Cal.Rptr. ___ (1985). As we

also show *infra* (see Point III). *Tenzer* dealt with circumstances in which an agreement may be enforced notwithstanding the statute of frauds, and has nothing whatever to do with the California law proscribing recovery for broker's services rendered illegally. Again, the court of appeals herein was fully apprised of the contentions of the parties as to the effect of *Tenzer* by letters from petitioners and respondents.

It is clear that the court of appeals carefully considered the arguments on both sides concerning *Asdourian* and *Tenzer* before rejecting petitioners' contentions by denying the petition for rehearing.

II

THE COURT OF APPEALS CORRECTLY HELD THAT AN OUT-OF-STATE CORPORATION, DOMICILED IN NEW YORK AND NEVER LICENSED IN CALIFORNIA, IS PRECLUDED BY CALIFORNIA LAW FROM ACTING AS A BROKER IN CALIFORNIA OR RECOVERING A COMMISSION FOR BROKERAGE SERVICES. THE CASE RELIED ON BY PETITIONERS IN THEIR PETITION FOR CERTIORARI DOES NOT CONFLICT WITH THAT DECISION.

Under California law, where there is a single brokerage agreement to employ the services both of a licensed broker and of an unlicensed person, the agreement, being joint, is entirely void and unenforceable and neither party may recover thereupon. *Haas v. Greenwald*, 196 Cal. 236, 237 P. 38 (1925) (aff'd 275 U.S. 490), *Wise v. Radis*, 74 Cal.App. 765, 242 P. 90 (1925), *Estate of Prieto*, 243 Cal.App.2d 79, 52 Cal.Rptr. 80 (1966).

It is undisputed that, in the present case, the individual petitioner was licensed, and the corporate petitioner was not. In addition, petitioner Richard A. Plehn testified that

petitioners scrupulously maintained the separate identity of the corporate petitioner, and that the individual petitioner and the corporate petitioner "co-brokered the transaction," as they had done on previous deals. The district court so found and the court of appeals pointed out in its opinion that this was not disputed on appeal (nor do petitioners take issue with that finding now).

Indeed, the record before the court on the summary judgment motion shows that Mr. Plehn declared under penalty of perjury:

> "4. Plehn, Inc. - New York and *Plehn, Inc. California* are maintained on an ongoing basis as separate corporations, in compliance with the separate laws of each of their respective states of incorporation. Each files separate income tax returns and *in all respects, maintains its own corporate identity.*
>
> "5. *All dealings with the defendants* to this action, as stated in the complaint filed herein on February 3, 1983 were between myself, as an individual, *Plehn, Inc. - New York* and the defendants. This is consistent with *the manner in which I conduct most of my real estate transactions.* Usually, in joint venture deals, such as in this case, *I co-broker the transaction* as an individual, *along with Plehn, Inc. - New York.* In mortgage deals, Plehn, Inc. - California brokers the transaction in most cases.
>
> "6. In this connection, *all correspondence* to my knowledge, *was between the defendants* on one side *and Plehn, Inc. - New York* or myself as an individual on the other side. There was no correspondence between the defendants and Plehn, Inc. - California.
>
> "7. *All billing* in the transaction involved in this suit was done by myself as an individual *and by*

Plehn, Inc. - New York. Plehn, Inc. - California is not now, nor has it ever been, involved in the collection of the fee involved herein.

"8. I, Richard A. Plehn, personally am licensed by the State of California to act as a real estate broker in California. As such, I am able to conduct real estate transactions in California as an individual, as I did in this case *in conjunction with Plehn, Inc. - New York*. In no way at all was Plehn, Inc. - California involved in this transaction.

"9. It is my belief that Plehn, Inc. - California has no connection at all with the transaction sued upon in this action. It was solely myself as an individual *and Plehn, Inc. - New York* who performed services for the defendants in connection with the transaction involved herein."

Mr. Plehn also stated the following facts under oath:

"As stated in my previous declaration filed with plaintiff's memorandum of points and authorities in opposition to defendant's motion to dismiss, in my dealings with the defendants in this matter, I was acting *on behalf of Richard A. Plehn, Inc. a New York corporation.*

"To my knowledge, *all correspondence* with the defendants regarding this joint venture deal *emanated from the offices of Richard A. Plehn, Inc., a New York corporation.* Furthermore, to my knowledge, all correspondence from the defendants was *addressed to the offices of Richard A. Plehn, Inc., a New York corporation.*"

and the following:

"The billing for the services performed by the plaintiffs in this action was made on behalf of myself as an individual *and on behalf of Richard A. Plehn, Inc., a New York corporation.* This billing is attached to this declaration as Exhibit 'B'."

Furthermore, in the following sworn responses to interrogatories, petitioners state that Mr. Plehn (the individual) and Plehn, Inc. (the corporation) *jointly* undertook employment *as real estate brokers*. With reference to the agreement which petitioners contended they had made with respondents for a commission, petitioners were asked *to identify the parties to that agreement*, and to set forth its terms:

RESPONSE TO INTERROGATORY NO. 17:

. . .

b) [Parties:] Richard A. Plehn, *Richard A. Plehn, Inc. of New York*, Imperial Bancorp, and Imperial Bank.

e) [Terms:] The *plaintiffs* agreed to procure a lender and joint venture partner for a commercial building project ('the project') to be constructed on the defendants' property, located at or near the northwest corner of Wilshire and Figueroa in Los Angeles, California. In other words, the *plaintiffs* agreed to provide financing for the project. In return for this, the defendants agreed to pay *plaintiffs* a commission equal to one point, or one percent (1%), of the amount of the financing committed by the lender and joint venture partner located *by plaintiffs*. Richard A. Plehn *and Richard A. Plehn, Inc.*, a New York corporation, had had *prior similar dealings* with George M. Eltinge and George Graziadio, as individuals and partners, in which the *plaintiffs were compensated in a similar manner* for similar services rendered."

And Mr. Plehn testified as follows concerning the role that the New York corporation played in the transaction:

"Q Well, were all the things that you did in connection with this proposed transaction done in behalf of Richard A. Plehn, Inc., as a corporation?

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"A I believe that *Richard A. Plehn, Inc., did all the work.*

"Q What work did it do?

"A *It wrote the letters; it did the computations. It did it all in its offices in New York City.*"

Notwithstanding the above testimony, petitioners assert in their petition for certiorari (as they did below) that the two petitioners should be viewed as a "single person" for purposes of the law.[4] That argument flies in the teeth of the facts, including the fact that the corporation was not authorized to render brokerage services in California, the fact that it had *an officer other than Mr. Plehn* engaged in brokerage activities on the present matter, the fact that petitioners sent respondents a statement for the claimed commission on behalf of Mr. Plehn as an individual *and on behalf of the corporate petitioner* as a corporation, and requested that the commission be *paid to the corporate petitioner* at its New York office, and the fact that, far from considering itself 'the same entity" as the individual petitioner, the corporation joined in the present lawsuit as a separate plaintiff.

The case relied on by petitioners on their petition for certiorari is *Asdourian v. Araj*, 38 Cal.3d 276, 696 P.2d 955, 211 Cal.Rptr. 703 (1985). In that case, Mr. Asdourian took out a contractor's license, and had it issued in the name of "Artko Remodeling and Construction", which was the name of his sole proprietorship. It is elementary that a sole proprietorship is not an entity separate from the sole proprietor in any sense of the word, and merely constitutes the use of a fictitious name or "dba". Nevertheless, Mr. Asdourian's name and signature appeared on the license as the "responsible managing party" (a requirement of California law which petitioners in the present case have totally disregarded).

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[4]Petitioners also use the term "person" ambiguously, glossing over whether it refers to a legal entity or to a natural person.

The problem in *Asdourian* arose because plaintiff's license was in his fictitious business name rather than his personal name. That is all there was to the case. Accordingly, the California Supreme Court had no difficulty applying the so-called "substantial compliance" doctrine. In so doing, the Supreme Court emphasized time and again that there was only *one entity*, that *no corporate entity* was involved, that the business entity (namely Mr. Asdourian as an individual proprietorship) was *precisely the same* as that to which the license had been issued, and that, in essence, Mr. Asdourian *was* Artko. Thus the court stated (at p. 288):

> "Although he used a different name and should have obtained a separate license to comply with section 7028.5, his qualifications did not change, nor did the status or form of his business. He was *simply using a different name for the same sole proprietorship.*"

Interestingly, the Supreme Court in *Asdourian* pointed out that a different situation would have been presented if Mr. Asdourian had incorporated Artko (as he had originally intended).[5] The Supreme Court stated (at p. 284-285):

> "In this case, plaintiff obtained a license for his sole proprietorship under the name Artko. Plaintiff's name was on the license as the responsible managing party. At the time the license was issued, he intended to incorporate Artko. Had he done so, Artko would have become an entity separate from plaintiff. However, the incorporation never took place, and the business remained a sole proprietorship. Plaintiff was personally responsible for all debts and responsibilities incurred by the business, and the assets of the business were

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[5]There was of course no suggestion that Mr. Asdourian had had any plans to operate with an unlicensed out-of-state corporation not disclosed to the California Commissioner, as the petitioners did in the present case.

> plaintiff's assets. In essence, plaintiff *was* Artko." [emphasis by the court]

The Supreme Court emphasized that an additional license in Mr. Asdourian's personal name would not have provided any different information concerning the status or solvency of plaintiff's business, because such additional license would necessarily have been issued to the *same entity* as the existing license. The Supreme Court stated (at 287):

> "Nor would it [the additional license] have provided any different information *concerning the status or solvency* of plaintiff's business. The business *entity* was *precisely the same* as that to which the license had been issued."

In the present case, we are not dealing with a single entity, but with two separate entities, each with its own status and solvency (or insolvency). Here the unlicensed petitioner which claimed a commission was an out-of-state corporation[6] engaged in the brokerage business in California illegally and totally beyond the reach of the California Real Estate Commissioner.

In that connection, petitioners repeatedly assert in their petition that Mr. Plehn was "the *only person*" who performed the services giving rise to the present action. [Emphasis by petitioners]. However, the undisputed evidence was otherwise: the declaration of Richard M. Staff, executive vice-president of the unlicensed New York corporation, states that Mr. Staff met with Imperial's board chairman on June 2, 1982 and discussed the proposed financing of construction on Imperial's property.

The circumstances of the present case highlight the legislative concerns underlying the licensing statutes. Section 10157 of the California Business and Professions Code ("B&PC") provides that:

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[6]In *Asdourian*, the plaintiff of course operated entirely in California.

> "*No real estate license* gives authority to do any act specified in this chapter to any person, *other than the person to whom the license is issued.*"

and B&PC §10211 provides that, where the licensee is a corporation, that license entitles "one officer thereof" to act as a real estate broker on behalf of the corporation (if that officer can personally qualify), and that such officer *must be designated* in the application of the corporation.

Obviously, in the present case, neither the individual petitioner nor anyone else was so designated, nor was any license for the corporation even applied for.

The California legislature has expressed special concern lest out-of-state corporations operate in California without complying with the safeguards provided by the California real estate broker licensing laws. B&PC §10162 specifically provides in relevant part that every broker

> *"shall have and maintain a definite place of business in the State of California which shall serve as his office for the transaction of business"*

and that such broker shall not do business except from that location.

Although the above requirements of B&PC §10162 (which have been in effect since 1943) in any event clearly applied to the corporate petitioner herein, the legislature amended B&PC §10151.5, effective July 1, 1985, to emphasize specifically that a foreign corporation which renders broker's services in California must comply with B&PC §10162. Although the amendment became effective subsequent to the operative events in the present case, its enactment certainly shows the legislature's concern about the conduct of the brokerage business by unlicensed corporations operating from out-of-state.

In contrast to the *Asdourian* case, *supra*, in which plaintiff Asdourian *satisfied* all the concerns underlying the licensing statutes, plaintiffs in the present case operated in such manner as to *violate* all of these important concerns:

(a) Neither the individual petitioner nor any other person was designated as the responsible officer for the out-of-state corporate petitioner;

(b) The out-of-state corporate petitioner never applied for a license;

(c) The out-of-state corporation in fact operated on the present transaction through the services (in addition to Mr. Plehn) of another officer of the corporation, Mr. Richard M. Staff, who was never designated as responsible officer, whose existence was never disclosed to the Commissioner of Real Estate, and who does not appear to have been licensed at all;

(d) The out-of-state corporation failed to maintain a place of business in the State of California (thus violating the statute), and operated its California business out of New York, and not California (thus, further violating the statute).

Contrary to what petitioners assert in their petition, the *Asdourian* case does not "diametrically conflict" with the prior California law. On the contrary, the prior law was identical in holding that, where the licensee merely did business *under a fictitious name*, the concerns of the legislature were satisifed. Indeed, those were the precise facts of *Schantz v. Ellsworth*, 19 Cal.App.3d 289, 96 Cal.Rptr. 783 (1971), which was cited by both petitioners and respondents in the court below for the doctrine that recovery may be had under some circumstances in the absence of a second license for the *same individual* at a *second address* and under a *fictitious name*.[7] The Supreme Court in *Asdourian, supra*, highlighted the

[7]Similarly, the court of appeals observed that in *In re Estate of Baldwin*, 34 Cal.App.3d 596, 110 Cal.Rptr. 189 (1973), a licensed individual was permitted to recover for brokerage services where the court made a factual finding that the individual "was merely doing business under a fictitious name." The court of appeals rejected petitioners' contention that the case authorized recovery by an unlicensed corporation.

importance of *Schantz, supra,* in controlling the result of *Asdourian,* because both cases involved nothing more than a different name for a single licensee (at p. 288):

> "*This case is more similar to Schantz v. Ellsworth* (1971) 19 Cal.App.3d 289 [96 Cal.Rptr. 783]. In *Schantz,* the plaintiff was personally licensed as a real estate broker. He also *did business under the fictitious name* 'Investment Trends.' "

The Supreme Court also stated (*ibid.*):

> "The plaintiff in *Schantz* was allowed to bring an action under a contract made and performed *while using the fictitious name.* The Court of Appeal held that all section 10136 'literally' requires is proof that the plaintiff was a 'duly licensed' real estate broker. Therefore, it 'does not preclude maintenance of [an] action *by one who holds a valid real estate broker's license* but who has failed to obtain . . . *a license for the use of a fictitious name.*' "[Deletion by the Court.]

The *Asdourian* court further stated (at p. 288):

> *"The policy considerations here are indistinguishable from those in Schantz.* Plaintiff obtained a license *under the name 'Artko'.* In connection with the issuance of that license, his qualifications were examined and approved. Although *he uses a different name* and should have obtained a separate license to comply with section 7028.5, his qualifications did not change, *nor did his status or form of his business.* He was *simply using a different name for the same sole proprietorship."*

Thus, the California court, in *Asdourian,* broke no new ground in holding that the plaintiff, as owner of his sole proprietorship business, and thus in fact licensed, could recover compensation.

Petitioners also vastly overstate and misinterpret the *Asdourian v. Araj* opinion, asserting that it "disapproved

in all material respects" and "expressly disapproved the holding in" *General Insurance v. Superior Court*, 26 Cal.App.3d 176, 102 Cal.Rptr. 541 (1972). Both assertions reflect a misreading of *Asdourian*. The opinion did chide the *General Insurance* court for citing the dissent in *Latipac v. Superior Court*, 64 Cal.2d 278, 411 P.2d 564, 49 Cal.Rptr. 676 (1966), and noted that it "was not free to disregard" the rule announced by the majority. However, the *Asdourian* court carefully limited it treatment of *General Insurance* as disapproval only "*to the extent* that [it] rests on the logic of the *Latipac* dissent." (38 Cal.3d at 288). Contrary to petitioners' assertions, the holding in *General Insurance* was *not* disapproved, nor did the court modify its own opinion in *Lewis & Queen v. N.M. Ball Sons*, 48 Cal.2d 141, 150-151, 308 P.2d 713 (1957) relied on by *General Insurance*:

> "Section 7031 [10136] represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting [brokerage] business outweighs any harshness between the parties, and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of the state."

Petitioners would have this Court believe that the district court and court of appeals did not consider the substantial compliance doctrine. The record is otherwise. In its Memorandum of Decision and Order the district court held that the substantial compliance doctrine could be considered, and proceeded to consider it. (Appendix B to petition for certiorari, p. B8):

> "Defendants argue that the *General Insurance* case forecloses application of plaintiffs' substantial compliance theory in brokerage license cases also. . . . Thus, *contrary to the assertions of defendants, General Insurance does not automatically forcelose plaintiffs' substantial compliance argument in brokerage licensing cases.*"

Thus the trial court recognized that in limited circumstances the substantial compliance doctrine may apply, but the trial court simply found that the undisputed facts did not warrant application of the substantial compliance doctrine here. Petitioners were given full consideration by the district court of the very doctrine they now urge should have been considered, and the court of appeals affirmed the district court's judgment.

The *Asdourian* case is simply inapposite, and cannot provide any basis for a writ of certiorari from this court.[8]

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[8]In an apparent attempt to get around this fact, petitioners have cited a decision of the intermediate California appellate court, *Knapp Development & Design v. Pal-Mal Properties, Inc.*, 173 Cal.App.3d 423, ___ Cal.Rptr. ___ (1985). Although *Knapp* involved a corporation and an individual, the case does not help petitioners herein. This is because of the unusual fact that the unlicensed corporation and the owner of the property for whom the services were rendered in *Knapp* were controlled by the same individual. Thus, acknowledging that the rule of *Schantz* and *Asdourian* would not normally apply to a separate unlicensed corporation (such as the present case), the court of appeal pointed out that these concerns were overcome by the fact that the contractor and its customer were in fact controlled by the same person (at p. 432):

> "Inasmuch as Joan *Knapp represented both parties to the contract and was the managing officer or partner of both entities*, there was no problem of the other party to the contract being misled as to the responsibility or competence of the contractor due to unawareness of the contractor's unlicensed status."

and (at p. 435):

> "Moreover, the party contracting with plaintiff, RHC, could not have been misled as to plaintiff's solvency or financial condition inasmuch as both parties were controlled by the same individual."

Aside from the above, *Knapp* of course is only a decision of the intermediate court of appeal, and the California Supreme Court has subsequently denied a hearing in the case. Such denial is not an expression of the Supreme Court on the merits. This point was recently reemphasized in the "Report and Recommendations of

III

THE COURT OF APPEALS CORRECTLY HELD THAT THE STATUTE WHICH PROHIBITS A PLAINTIFF FROM RECOVERING FOR BROKER'S SERVICES BECAUSE THAT PLAINTIFF IS UNLICENSED CANNOT BE CIRCUMVENTED BY LABELING THE ACTION AS BEING ONE IN *QUANTUM MERUIT* OR FOR "FRAUD". THE CASE RELIED ON BY PETITIONERS ON THIS PETITION FOR CERTIORARI DOES NOT CONFLICT IN ANY WAY WITH THAT RULE.

It is established law in California that an unlicensed person cannot bring an action to recover for broker's services rendered without a broker's license. Section 10136 of the Business and Professions Code explicitly so provides. Where

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the Advisory Committee to Implement Proposition 32" (a recent Constitutional amendment revising the applicable procedures), which stated (at pp. 21-22):

> "It has long been established in California law that *c denial of hearing is not an expression of the Supreme Court on the merits* of the cause. [Citations omitted]. Adoption of the new 'review' procedure does not affect this legal doctrine, and denial of review will not be an expression of the opinion of the Supreme Court on the correctness of the judgment of the Court of Appeal or on the correctness of any discussion in the Court of Appeal opinion."

The California Supreme Court itself stated this principle as follows, in *People v. Triggs*, 8 Cal.3d 884, 890, 106 Cal.Rptr. 408, 506 P.2d 232 (1973) (overruled on other issues):

> "Preliminarily we declare that our refusal to grant a hearing in a particular case is to be given *no* weight insofar as it might be deemed that we have acquiesced in the law as enunciated in a published opinion of a Court of Appeal when such opinion is in conflict with the law as stated by this court." [Emphasis by the Court].

there is a single brokerage agreement to employ the services both of a licensed broker and an unlicensed person, the entire contract is illegal and recovery by either of the licensees is precluded by the statute. *Haas v. Greenwald,* 196 Cal. 236, 237 P. 38 (1925) (aff'd 275 U.S. 490), *Estate of Prieto,* 243 Cal.App.2d 79, 52 Cal.Rptr. 80 (1966).

It is equally well-established law in California that an unlicensed person who is thus precluded from recovering on such an illegal contract *because that person is unlicensed,* cannot recover for those services on any theory which requires that person to disclose the illegal contract or transaction as an element of his case. *Wise v. Radis,* 74 Cal.App. 765, 242 P. 90 (1925), *Fewel & Dawes, Inc. v. Pratt,* 17 Cal.2d 85, 109 P.2d 650 (1941).

Petitioners rely in their petition for certiorari on *Tenzer v. Superscope, Inc.,* 39 Cal.3d 18 (1985), 702 P.2d 212, 216 Cal.Rptr. 130 (1985). Petitioners assert that *Tenzer* has abrogated the above rule. *Tenzer* does nothing of the kind.

Tenzer was *not* an action for a *broker's* fee, but for a *finder's* fee. The distinction is crucial, because, while a broker must be licensed in California in order to receive a commission, a mere finder who performs no brokerage services is exempt from any licensing requirement. *Shaffer v. Beinhorn,* 190 Cal. 569, 213 P. 960 (1923).

The problem faced by the plaintiff in *Tenzer* was that his finder's fee agreement *had not been reduced to writing,* and thus did not comply with the statute of frauds, Civil Code §1624, subdivision (d) of which specifically requires a finder's fee agreement to be in writing.[9] It is elementary law that, in contrast to the brokers' licensing laws, which make the rendering of broker's services by an unlicensed person *illegal,*[10]

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[9]In *Tenzer,* there was also an issue as to whether Tenzer, who was admittedly unlicensed, had acted as a broker or as a mere finder. In the present case, both the trial court and the court of appeals found that broker's services had been rendered, and no issue concerning the same is presented on this petition.

[10]B&PC §10139 makes the rendering of such services by an unlicensed person a criminal offense.

failure to comply with the statute of frauds does not make the finder's fee contract illegal, but merely *unenforceable*. *Masin v. Drain*, 150 Cal.App.3d 714, 198 Cal.Rptr. 367 (1984). In *Tenzer v. Superscope, supra*, the plaintiff finder contended that the defendant should be estopped to assert the *statute of frauds* in an action based on unjust enrichment and fraud. The Supreme Court held that the doctrine of estoppel to plead the statute of frauds may be applied where necessary to prevent either unconscionable injury or unjust enrichment where the brokers' licensing law is not involved.

On the fraud point, the court referred to the so-called "*Kroger*" rule, based on *Kroger v. Baur*, 46 Cal.App.2d 801, 117 P.2d 50 (1941), which the court in *Tenzer* characterized as follows (at p. 29):

> "A series of cases have held that an action for fraud cannot be maintained where the allegedly fraudulent promise is unenforceable as a contract *due to the statute of frauds.*"

The California Supreme Court in *Tenzer* then simply disapproved the so-called *Kroger* rule, at least on the facts of *Tenzer*, which did not involve any licensed broker.

Respondents' citation to the court of appeals of the earlier decision of the intermediate California appellate court in *Tenzer v. Superscope* is irrelevant in view of the established case law on brokers' licensing, which remains unchanged. It is clear that the subsequent opinion of the California Supreme Court in *Tenzer* dealt *only* with the statute of frauds, and that it did not touch in the slightest the rule that an unlicensed person who performs broker's services cannot overcome the illegality of those services by any other legal theory which still requires him to disclose the illegal transaction as an element of the case.

Furthermore, the California Supreme Court in *Tenzer* made clear that its holding, *even as to the statute of frauds*, only applied to *finders*, and not to *brokers*. Thus, the court cited a long series of California cases (starting with *Keely*

v. Price, 27 Cal.App.3d 209, 103 Cal.Rptr. 531 (1972)) which hold that real estate brokers will be held strictly to the statute of frauds ("*Keely v. Price*" rule), and simply stated that it declined to extend the scope of the *Keely v. Price* rule to unlicensed finders such as Tenzer. In doing so, the court emphasized the importance of the rigorous application of the statute of frauds to brokers (at pp. 27-28):

> "The rationale for rigorous application of the statute of frauds to bar claims by licensed real estate brokers is related to the statutory licensing requirements. Real estate brokers are licensed as such only after they have demonstrated a knowledge of the laws relating to real estate transactions [citations], and it would seem that they would thus require less protection against pitfalls encountered in transactions regulated by those laws."

The court also made it clear that, in allowing Mr. Tenzer to seek enforcement notwithstanding the statute of frauds, it was *not* holding that a contract for brokerage services would be similarly favored. The court stated (at p. 29):

> "The law has traditionally had little sympathy with the broker who has failed to sign up his client."

Petitioners' posture throughout this appeal has been that the two plaintiffs in this action were but a single person, and that the court should therefore treat them as fully qualified and licensed real estate brokers. Aside from the fact that *Tenzer* does not in any event deal with the broker licensing statutes, petitioners should not now be heard to portray themselves as unsophisticated finders such as the plaintiff in *Tenzer*.

The decision in the court of appeals in the present case, was, and remains, in full accord with California law, and provides no basis for review on certiorari.

IV

CONCLUSION

The decision of the court of appeals was in all respects in full accord with the long-established California law. That court had before it on the petition for rehearing the two cases relied on by petitioners on the present petition, and received the briefs and arguments of both sides as to the applicability of those cases to the facts of this case and as to whether those cases modify the applicable California law regarding real estate broker licensure. The court of appeals was correct in its determination that its decision remains in full accord with California law and in denying the petition for rehearing.

There is no basis for granting review in this case.

The petition for certiorari should be denied.

Dated: January 31, 1986

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD A. PLEHN INC., and RICHARD A. PLEHN, Plaintiffs and Appellants, IMPERIAL BANCORP, and IMPERIAL BANK, Defendants and Appellees.	CASE NO. 84-5905 DC NO. CV 83-678 RJK (GX)

PETITION FOR REHEARING (BY PANEL)

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I.

INTRODUCTION

Plaintiffs and Appellants respectfully petition this Court for rehearing (by Panel) pursuant to Rule 40 of the Federal Rules of Appellate Procedure, on two separate grounds. *First,* a decision of the California Supreme Court announced after this appeal was submitted, compels reversal of the district court's entry of a summary judgment. *Second,* this Court's Memorandum of decision suggests it misapprehended the legal effect of its determination that the district court misapplied *Radobenko v. Automated Equipment Corp.*, 520 F.2nd 540 (9th Cir. 1975), and therefore failed to consider material facts.

II.

THE CALIFORNIA SUPREME COURT'S RECENT DECISION IN *ASDOURIAN V. ARAJ* MANDATES THAT THE DOCTRINE OF SUBSTANTIAL COMPLIANCE BE APPLIED IN THIS CASE

This is a diversity case, in which California law is controlling. *Mardirosian v. Lincoln National Life Ins. Co.*, 739 F. 2d 474, 476 (9th Cir. 1984).

California's substantial compliance doctrine provides that "the licensing law should not be so literally construed to require exact compliance if it would transform the statute into an unwarranted shield for the avoidance of a just obligation." In re Estate of Baldwin, 34 Cal. App. 3d 596, 605, 110 Cal. Rptr. 189 (1973). Plaintiffs argued in their briefs that under *Baldwin, supra,* and *Schantz v. Ellsworth,* 19 Cal. App. 3d 289, 96 Cal. Rptr. 783 (1971), which present facts that are closest to those in this case, the substantial compliance doctrine permits

them to recover a commission on a loan commitment notwithstanding their lack of literal compliance with California's real estate broker licensing law.

Plaintiffs based this contention on the undisputed facts that: (1) Richard A. Plehn held a valid California real estate broker's license; (2) Plehn was the only person physically performing services for defendants in this transaction; and (3) no different services were provided to defendants by Plehn's wholly owned, closed corporation, Plehn, Inc., than the services provided by Plehn himself. This Court declined to apply the substantial compliance doctrine because Plehn had stated that he "co-brokered" the transaction with his corporation Plehn, Inc, which did not have a California real estate broker's license. The Court reasoned that Plehn's statement brought the case within the rule of *In re Guardianship of Estate of Prieto,* 243 Cal. App. 2d 79, 52 Cal. Rptr. 80 (1966), where recovery of a brokerage commission was forclosed because one of two separate and unrelated parties who were jointly providing brokerage services was unlicensed.

This Court's ruling is fundamentally inconsistent with the recent decision of the California Supreme Court in *Asdourian v. Araj,* 85 Daily Journal D.A.R. 914 (announced March 11, 1985) (copy annexed as Appendix A). In *Asdourian* the Supreme Court disapproved in all material respects the single most important case relied on by defendants, *General Insurance v. Superior Court,* 26 Cal. App. 3d 176, 102 Cal. Rptr. 541 (1972); and reaffirmed with force and clarity the rule that in California, the lack of literal compliance with a licensing statute will not preclude a party from recovering for services rendered where the legislative purpose of the licensing statute is satisfied. The *Asdourian* decision is

indistinguishable from this case, and requires a reversal of the district court's summary judgment.

The plaintiff in *Asdourian* was a contractor who performed extensive construction work for defendant which included the conversion of a garage into a restaurant on one piece of property and the remodeling of another. When the defendant refused to pay for these services plaintiff brought suit for breach of contract and won a judgment in the trial court.

On appeal the defendant argued, *inter alia*, that plaintiff was not licensed as a contractor under the contractor licensing law (Business & Professions Code Section 7031) and therefore could not bring suit to recover compensation for his work. The plaintiff had obtained a contractor's license in the name of his business "Artko Remodeling and Construction," but had failed to obtain a license in his own name. Plaintiff's name and signature appeared on the Artko license as "the responsible managing party." *Asdourian*, supra, 85 D.A.R. at 914. However, since the plaintiff had used his own name in the transaction the defendant argued that plaintiff was not duly licensed and could not maintain suit.

The Supreme Court rejected defendant's contention that plaintiff could not recover for his services, ruling that the substantial compliance doctrine was applicable. At the outset of its analysis the Court stated the basic rationale underlying the substantial compliance doctrine in licensing cases: "[w]e have not insisted on literal compliance in the situation in which the party seeking to escape his obligation has received the full protection which the [licensing] statute contemplates." *Asdourian*, *supra*, 85 D.A.R. at 914, quoting *Latipac, Inc. v. Superior Court*, 64 Cal. 2d 278, 279-280 (1960).

The Supreme Court proceeded to apply three factors originally developed in *Latipac, supra,* to determine whether a finding of substantial compliance was warranted. The *Latipac* factors which support a finding of substantial compliance are: "(1) the fact that plaintiff held a valid license at the time of contracting, (2) that plaintiff readily secured a renewal of that license and (3) that the responsibility and competence of plaintiff's managing officer were officially confirmed throughout the period of performance of the contract." *Latipac, supra,* 64 Cal. 2d at pp. 281-282. Before applying these factors the Supreme Court noted: "[if] the facts clearly indicate substantial compliance which satisfies the policy of the Contractors License Law, the failure to establish all of the Latipac factors should not defeat plaintiff's claim." *Asdourian, supra,* 85 D.A.R. at 915. As shown below the Supreme Court's analysis of the *Latipac* factors is equally applicable to this case and compels the conclusion that the plaintiffs here have substantially complied with California's real estate licensing law.

With respect to the first *Latipac* factor (whether plaintiff holds a valid license) the Court observed that the plaintiff's firm "Artko" held a valid license at the time the contract was executed. *Asdourian, supra,* 85 D.A.R. at 915. Since this license "provided sufficient evidence of plaintiff's qualifications," the Court reasoned that a separate license in plaintiff's own name would "not prevent defendant from receiving the full and effective protection of the statute." *Id.*

This reasoning directly applies here. Plehn held a valid California real estate brokers license and indisputably was the *only person* who performed the service of finding a mortgage lender for Imperial's real estate project. The procedure for licensing Plehn's corporation, Plehn, Inc., would have involved no more than the payment of a

$165.00 fee. As in *Asdourian*, the fact that Plehn, Inc. lacked a separate license in its own name "did not prevent defendant from receiving the full and effective protection of the statute." *Id.*

The Supreme Court determined that the second Latipac factor (whether plaintiff had renewed his license) was irrelevant because as Artko's license had never expired. *Id.* As noted in *Asdourian*, the Court of Appeals in *Latipac* stated that the purpose of this consideration was to confirm "plaintiff's continuing competence and responsibility during the period of performance." *Latipac, supra,* 64 Cal. 2d at p.283. The Supreme Court reasoned that this purpose was satisfied by the existence of a valid license issued to Artko. *Asdourian, supra,* 85 D.A.R. at 915. As above, this reasoning applies here since Plehn's license, like Artko's, never expired. Moreover, since Plehn's license is in *his own name* it confirms Plehn's "competence and responsibility" even more *directly* than Artko's license confirmed these attributes of the plaintiff in *Asdourian.*

Finally, the Supreme Court stated that the plaintiff in *Asdourian* clearly met the third *Latipac* factor, "which requires official confirmation of the responsibility and competence of plaintiff's managing officer throughout the period of performance of the contract." *Asdourian, supra,* 85 D.A.R. at 915, quoting *Latipac, supra,* 64 Cal. 2d at p.282. The Court's reasoning regarding this factor merits quotation in full:

> Here, the competence and experience of plaintiff Asdourian formed the basis of the license issued to Artko. "(A)ny matters which might form the basis of legitimate inquiry by the licensing board in determining the fitness of (Asdourian) to enjoy a license were

> 'necessarily considered' and resolved in connection with the issuance of the license to (Artko)." (Citations omitted.)
>
> Issuance of a license to Asdourian in his own name would not have provided defendant with any greater assurances that he was dealing with an experienced and competent contractor. Nor would it have provided any different information concerning the status of solvency of plaintiff's business. The business entity was precisely the same as that to which the license has been issued. The work would have been performed by the same employees, and supervised by the same person. Defendant would have obtained no better protection, and no different performance, had he contracted with Artko.

Asdourian, supra, at 915. As evidenced by this language, it is absolutely certain that the California Supreme Court endorses the position plaintiffs have repeatedly asserted in this case: the fact that Plehn held a valid license and was the *only person* who performed services under the agreement with Imperial warrants application of the substantial compliance doctrine. To use the Supreme Court's own words: "[i]ssuance of a license to . . . [Plehn, Inc.] would not have provided defendant[s] with any greater assurance that [they were] dealing with an experienced and competent [broker]. . . The work would have been performed by the same employee, and supervised by the same person." *Asdourian, supra,* 85 D.A.R. at 915. Clearly the California Supreme Court would direct a finding of substantial compliance in this case.

Moreover, the Supreme Court expressly disapproved the holding in *General Insurance Co. v. Superior Court,*

26 Cal. App. 3d 176 (1972), which Imperial itself asserted was "virtually identical" and factually "on all fours with the present case." [Appellees' Brief, p. 14.] Imperial relied entirely on *General Insurance* to distinguish *Estate of Baldwin, supra,* where the Court of Appeal applied the doctrine of substantial compliance to permit a licensed real estate broker who operated through an unlicensed fictitious business entity named Skyline Realty, Inc. to recover a brokerage commission. Imperial argued that in *General Insurance* a licensed individual was rendering services on behalf of an unlicensed corporation, whereas in *Baldwin* the services were rendered on behalf of the individual and "the corporation *was a mere dba or fictitious name for the individual.*" [Appellees' Brief, p. 17 (emphasis by Imperial).] This Court in its memorandum of decision similarly distinguished *Baldwin* on the ground that the individual there "was merely doing business under a fictitious name." [Memorandum p. 2, quoting *Estate of Baldwin, supra,* 110 Cal. Rptr. at 194.]

Asdourian makes it clear that this distinction between *Baldwin* and the present case, if it does exist, is not relevant to application of the substantial compliance doctrine. The Supreme Court in *Asdourian* was fully cognizant that in *General Insurance:* (1) the unlicensed entity was a separate corporation and not a mere dba; (2) the contract for services was entered into in the unlicensed name of the corporation; and (3) the licensed contractor was ostensibly acting on behalf of the corporation. This is manifest from the Supreme Court's recitation of the facts of *General Insurance:*

> Defendants rely primarily on the case of *General Ins. Co. v. Superior Court* . . . In that case, the individual performing the work was duly licensed. However, he formed a corporation of which he was the sole owner,

> president, chairman of the board and responsible managing officer. The corporation did not obtain a license because of the mistaken belief that the personal license was sufficient. *The corporation entered into a contract with defendant and completed performance.*

Asdourian, supra, p. 915 (emphasis added).

Despite the Supreme Court's appreciation of the facts that the unlicensed entity in *General Insurance* was a separate corporation which had "entered into a contract . . . and completed performance," the Court reasoned that these facts did not foreclose application of the substantial compliance doctrine. The Court determined that the result in *General Insurance* was based on the Court of Appeal's erroneous assumption that it was "not free to weigh . . . [equitable] considerations . . . ." *Asdourian, supra,* 85 D.A.R. at 915. The Supreme Court assumed that the *General Insurance* court had improperly relied on the dissent in *Latipac* when it should have followed "the clear rule announced by the majority." *Id.* As the Court stated:

> It has now been almost five decades since the doctrine [of substantial compliance] was first applied. The Legislature has manifested no disapproval. In the limited and extraordinary circumstances in which it is applied, the policies underlying the doctrine remain compelling. . . . To the extent that *General Insurance, supra,* 26 Cal. App. 3d 176 rests on the logic of the *Latipac* dissent, it is disapproved.

Asdourian, supra, 85 D.A.R. at 915.

The Supreme Court's discussion of the substantial compliance doctrine was not limited to cases involving

the contractor licensing law. In support of its conclusion that the contractor was entitled to recover his services, the Court discussed in detail *Schantz v. Ellsworth*, 19 Cal. App. 3d 289 (1971), a case involving the real estate licensing law. In *Schantz*, the Court of Appeal held that a licensed real estate broker was permitted to recover a brokerage commission notwithstanding that he had failed to obtain a license for the fictitious business name under which he was operating. The Supreme Court quoted the reasoning of the *Schantz* court in full:

> [T]he purpose of the licensing requirement is to protect the public from the perils incident to dealing with incompetent or untrustworthy real estate practitioners. (Citations.) The statutory purpose, insuring the competency and trustworthiness of real estate pracitioners, is satisfied by proof of plaintiff's valid real estate broker's license. It was in connection with the application for and issuance of that license that his competency and trustworthiness were examined.

Asdourian, supra, 85 D.A.R. at 915, quoting *Schantz, supra*, 19 Cal. App. 3d at pp. 292-293. In quoting this *Schantz* language the Supreme Court confirmed that in *all* licensing cases it is not the form of a transaction which determines whether the substantial compliance doctrine will be applied, but whether "the policy of the licensing statute has been effectively realized, and defendant has received in full measure the protection intended by the legislature." *Asdourian, supra*, 85 D.A.R. at 915, quoting *Latipac, supra*, 64 Cal. 2d at p. 281.

Plaintiffs respectfully submit that the Supreme Court's approach to the licensing issue in *Asdourian* diamet-

rically conflicts with the analysis of the Court in this case. This Court's memorandum of decision indicates that the Court did not consider whether the purpose of California's real estate broker licensing law was satisfied. Rather, the Court denied recovery under the rule of *Estate of Prieto* simply because Plehn admitted that he "co-brokered" the transaction with his wholly owned corporation, Plehn, Inc. In essence the Court's ruling was based on the external appearance or "style" of the transaction. By contrast, *Asdourian* holds that whether a party will be allowed to recover for services rendered notwithstanding a technical violation of a licensing statute depends entirely upon whether the policy goal of the statute is effectuated.

III.

REJECTION OF THE DISTRICT COURT'S APPLICATION OF *RADOBENKO v. AUTOMATED EQUIPMENT CORP.* PRODUCES MATERIAL FACTS WHICH MAKE THE "CO-BROKER" RULE INAPPLICABLE

It is undeniable that the statutory goal of "protecting the public from the perils incident to dealing with incompent or untrustworthy real estate brokers" was satisfied here. *Baldwin, supra,* at 605. Plehn holds a valid California real estate license which directly confirms his "compentence and responsibility" as a broker. *Asdourian, supra,* 85 D.A.R. at 915. He had previously provided brokerage services to the same officers of Imperial with whom he contracted in this case. Further, as in *Asdourian, Baldwin,* and *Schantz,* only one individual, Plehn himself, was physically rendering services under the commission agreement. As Plehn averred in his declaration of February 24, 1984: "All dealings between plaintiffs and defendants in

issue here were between defendants and myself . . . . In no sense did the corporation [Plehn, Inc.] render different or separate services to defendants." [E.R., to 34, pp. 25-26.] Since this Court expressly disagreed with the district court's decision to reject this declaration under *Radobenko v. Automated Equipment Corp.*, 520 F. 2d 540 (9th Cir. 1975), these material facts cannot now be ignored. *Cox v. American Fidelity & Cas. Co.*, 249 F. 2d 616, 618 (9th Cir. 1957). It is clear from these facts that a separate license in the name of Plehn, Inc. would not have provided defendants with any greater protection against incompetent brokers under California's real estate licensing law.

Applying *Asdourian*, even if Plehn, Inc. had been the *only* contracting entity and the *only* entity in whose name services were performed, the substantial compliance doctrine would not be foreclosed. These were the very facts of *General Insurance*, which was disapproved by the California Supreme Court. It would therefore be anomolous to adopt a rule of law under the holding in *Estate of Prieto, supra*, which precludes application of the substantial compliance doctrine where a licensed individual and his unlicensed closely held corporation are deemed to act jointly in a transaction.

The holding in *Estate of Prieto* must be viewed in the context of the facts of that case. In *Estate of Prieto* two separate and unrelated parties "were *associated in a joint effort* to effect a lease." *Estate of Prieto, supra*, 243 Cal. App. 2d at 86 (emphasis added). The record contained "no evidence that either of them was a licensed real estate broker during the time in question." *Id.* at 83. It "affirmatively appear[ed]" that one of the parties "was an attorney-at-law and not a licensed real estate broker." *Id.* Under these facts - which are dramatically different than the facts before this court - it is

understandable why a court would decline to apply the doctrine of substantial compliance would not be applied. The "competence and responsibility" of the attorney to act as a real estate broker had never been confirmed. Therefore, even if the attorney's partner in the transaction ("Dunlevie Associates") held a real estate license (which was not disclosed by the record), it could not be said that the client received the full protection the licensing statute contemplated. The license of Dunlevie Associates, if it did exist, had no bearing whatsoever on the attorney's capabilities as a real estate broker. Unlike the facts of *Asdourian, Baldwin, Schantz* and the case now before this Court, the attorney in *Estate of Prieto* would have been required to take the real estate brokers examination to obtain a valid brokers license.

There is simply no basis for concluding that the rule of *Estate of Prieto* may bar a finding of substantial compliance, where the purpose of the California real estate licensing law has been satisfied. The substantial compliance rationale governed the holdings of *Asdourian, Baldwin* and *Schantz*. Application of this rationale in the holdings of those cases would not have been altered in any way, had plaintiffs (or any of them) stated that they acted "*jointly*" with their unlicensed business entities. The "co-broker" rule would still not block recovery.

Under the criteria announced in *Asdourian* plaintiffs have substantially complied with California's real estate licensing law. To ignore this inescapable conclusion based only on Plehn's statement that he co-brokered the transaction with Plehn, Inc., would be to elevate the form of a transation over the substantive policy concerns of the California legislature; and to disregard controlling California decisional law.

IV

CONCLUSION

For the foregoing reasons plaintiffs respectfully request that their Petition for Rehearing be granted.

DATED: April 15, 1985

PETTIT & MARTIN
ROBERT P. MALLORY
PETER M. BRANSTEN

By: Robert P. Mallory
Robert P. Mallory
Attorneys for Plaintiffs and
Appellants.

APPENDIX A

[Note: Appendix A to the petition for rehearing consists solely of the text of the *Asdourian* opinion, 38 Cal. 3d 276, 696 P. 2d 95 (1985). That opinion is therefore not reproduced herein]

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD A. PLEHN INC., and RICHARD A. PLEHN, Plaintiffs and Appellants, v. IMPERIAL BANCORP AND IMPERIAL BANK, Defendants and Appellees.	Case No. 84-5905 DC NO. CV 83-678 RJK (Gx) MOTION FOR LEAVE TO FILE ANSWER TO PETITION FOR REHEARING; MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATION OF GLENN R. WATSON IN SUPPORT OF MOTION

Defendants and appellees, Imperial Bancorp and Imperial Bank, hereby respectfully move the court for an order granting leave to file an answer to the petition for rehearing filed by appellants herein on or about April 15, 1985.

This motion is made pursuant to Federal Rules of Appellate Procedure, Rules 27(a) and 40(a) on the

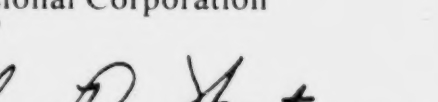
grounds that, in their petition, appellants have misconstrued and misstated the recent decision of the California Supreme Court in *Asdourian v. Araj*, 38 Cal.3d 276 (March 11, 1985), appellees have had no prior opportunity to address that case, and the court should have the benefit of appellees' answer in ruling on the petition for rehearing. The proposed answer to the petition for rehearing is being lodged with the court concurrently herewith.

The motion will be based upon this document, the attached memorandum of points and authorities and declaration of Glenn R. Watson, and upon all the briefs and papers contained in the court's file in this case.

WHEREFORE, defendants and appellees respectfully request that their motion for leave to file an answer to the petition for rehearing be granted as prayed and that the answer to petition for rehearing lodged with the court concurrently herewith be accepted for filing.

DATED: April 24, 1985

GLENN R. WATSON,
ARNOLD SIMON,
MITCHELL E. ABBOTT, of
RICHARDS, WATSON, DREYFUSS & GERSHON
A Professional Corporation

By 

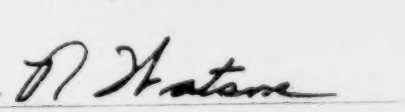
Glenn R. Watson
Attorneys for Defendants and Appellees, Imperial Bancorp and Imperial Bank

MEMORANDUM OF POINTS AND AUTHORITIES

Federal Rule of Appellate Practice 40(a) provides that ordinarily an answer to a petition for rehearing will not be accepted for filing unless it has been requested by the court. In this case, however, the petition is based exclusively on a recent decision of the California Supreme Court, decided after the case before this court was briefed, argued and submitted, which appellants have seriously misconstrued. Appellees have never had an opportunity to argue the effect of that decision to this court. In order that the court might have the benefit of appellees' analysis of this new case, appellees seek leave to file their answer to the petition for rehearing now. Granting the motion may serve to expedite the complete consideration and determination of the petition for rehearing and the delay which may otherwise result if the filing of an answer were deferred until a request were received from the court. Appellees believe that their answer to the petition for rehearing would contribute an analysis and new material that should be useful to the court.

Respectfully submitted,

GLENN R. WATSON,
ARNOLD SIMON,
MITCHELL E. ABBOTT, of
RICHARDS, WATSON, DREYFUSS & GERSHON
A Professional Corporation

By 

Glenn R. Watson
Attorneys for Defendants and Appellees, Imperial Bancorp and Imperial Bank

DECLARATION OF GLENN R. WATSON

I, GLENN R. WATSON, hereby declare:

I am an attorney at law duly admitted to practice before this court and before all of the courts of the State of California. I am a senior member of RICHARDS, WATSON, DREYFUSS & GERSHON, A Professional Corporation, with offices in Los Angeles, California. I am the member of that firm principally responsible for representing the defendants and appellees in the above-entitled appeal. I have personal knowledge of the matters and facts set forth herein and, if called as a witness, could testify competently thereto.

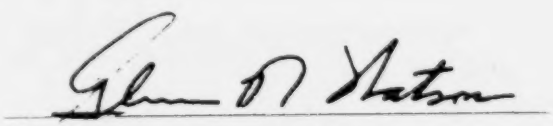
On April 16, 1985, I received the petition for rehearing filed by the attorneys for plaintiffs and appellants herein. That petition (apart from a rather weak subsidiary argument to the effect that this Court erred in certain of its conclusions), is based almost exclusively on a recent decision of the California Supreme Court entitled *Asdourian v. Araj*, 38 Cal.3d 276 (1985), decided after the case at bench was argued and submitted. Unfortunately, in their extensive argument regarding *Asdourian*, appellants manage to gloss over the single salient fact to which the Supreme Court referred again and again in its opinion, namely that the plaintiff contractor in that case was engaged in business as a sole proprietorship, *not a separate cooperate entity*. It seems clear that the California Supreme Court decision was based on the fact that the licensed business was a "dba" of the individual and not a separate, corporate entity. This point is likewise emphasized in the concurring opinion of Justice Kaus. In the present case, of course, substantial brokerage activities were performed not only by Richard A. Plehn, but also by

the co-broker, Richard A. Plehn, Inc., an unlicensed corporate entity.

The answer to petition for rehearing which I have prepared and which is being lodged with the court concurrently herewith analyzes the *Asdourian* opinion and demonstrates that it has no impact on the correctness of this court's decision. I have had no prior opportunity to present an analysis of that opinion to this court. In order to avoid delay in the disposition of the petition for rehearing and to provide an opportunity to be heard on the new decision, I request that the answer which I have lodged be accepted for filing.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 24, 1985



GLENN R. WATSON

ORDER

Upon the motion of defendants and appellees, and for good cause shown, now therefore,

IT IS HEREBY ORDERED that the motion of defendants and appellees for leave to file an answer to the petition for rehearing is GRANTED and the answer to petition for rehearing heretofore lodged with the clerk is accepted for filing as of this date.

DATED: _____

_____

Circuit Judge

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD A. PLEHN INC. and RICHARD A. PLEHN, Plaintiffs and Appellants, v. IMPERIAL BANCORP AND IMPERIAL BANK, Defendants and Appellees.	Case No. 84-5905 DC NO. CV 83-678 RJK

ANSWER TO PETITION
FOR REHEARING

Appellants eagerly seize upon the recent California Supreme Court decision in *Asdourian v. Araj*, 38 Cal.3d 276 (1985) and baldly assert that it compels a rehearing. In so doing, appellants ignore the fundamental distinction between that case and the case at bench.

In *Asdourian* the plaintiff, an individual, was a licensed contractor. He took the license in the fictitious

name Artko Remodeling and Construction, which the Supreme Court pointed out, was "*simply using a different name for the same sole proprietorship*" (38 Cal.3d at p. 238).[1] However, plaintiff contracted in his personal name to do certain work for defendant rather than contracting in the fictitious name under which he held the license. Later he brought an action in his individual name for recovery for the construction work which he performed. The defendant raised the fact that the license was not in Asdourian's personal name as a defense.

There was no separate legal entity, no corporate party. Mr. Asdourian merely did business under a fictitious name. As the Supreme Court itself pointedly observed (in language which appellants ignore in their petition for rehearing):

> "Here, the form of plaintiff's business did not change at all. *It remained a sole proprietorship. Plaintiff simply used a different name for the business.*" (38 Cal.App.3d at 284)

The court held that these facts brought the case within "the limited and extraordinary circumstances" (Id. at 287) in which the doctrine of substantial compliance could be applied. Plaintiff was actually licensed, although the license was in his fictitious name, and the ultimate statutory purpose of protecting the public against the actions of an unlicensed person was satisfied.

The crucial distinction between that case and the case before this court is manifest. Here the New York corporation, Richard A. Plehn, Inc., was a separate legal entity. It was not licensed. The *corporate entity* undertook *jointly* with Richard A. Plehn, an individual,

---

[1]Except where otherwise stated, all emphasis herein has been added.

to "co-broker" the transaction. The corporation, an out-of-state corporation, billed for its brokerage activities which required a license. It sought to have the funds paid to its New [illegible]fice where it was domiciled. It joined as a pla[illegible] in a lawsuit which it cannot maintain in the teeth of the statutory prohibition against an unlicensed person bringing or maintaining an action for the collection of compensation for acts undertaken as a broker. (Bus. & Prof. Code 10136). Nothing in the *Asdourian* opinion suggests that such facts even come close to the "limited and extraordinary circumstances" required for the narrow substantial compliance doctrine to apply.

Appellants advance the argument that this court's analysis of *In re Estate of Baldwin*, 34 Cal.App.3d 596, 110 Cal.Rptr. 189, 194 (1973) in its memorandum is somehow undercut by the California court's decision in *Asdourian*. This court's memorandum distinguished the case at hand from *Baldwin*, in which recovery was allowed to the plaintiff, pointing out that:

> "The Baldwin decision was based upon the trial court's factual finding that all of the brokerage services were performed by the individual and that *the individual was merely doing business under a fictitious name*. 110 Cal.Rptr. at 194."

Appellants suggest that this distinction is not "relevant" in considering the applicability of the substantial compliance doctrine, as indeed they must in view of the fact that in *Asdourian* that was precisely the situation before that court: Mr. Asdourian was merely doing business under a fictitious name. That fact distinguishes both *Baldwin* and *Asdourian* from the situation before this court, in which a separate legal entity, an unlicensed out-of-state corporation, jointly entered into a brokerage

contract and engaged in brokerage activities for which it seeks compensation. Rather than undercutting this court's analysis of *Baldwin*, the *Asdourian* court's holding is consistent with it and falls into the same category as *Baldwin*.

Appellants would also have this court believe that the *Asdourian* court's approval of *Schantz v. Ellsworth*, 19 Cal.App.3d 289, 96 Cal.Rptr. 783, is contrary to this court's memorandum decision. On the contrary, *Schantz* is similar to *Baldwin* in that Mr. Schantz *was* a licensed real estate broker who conducted his business from two offices both located on Katella Avenue in Anaheim, California. Although *he held a valid broker's license*, he did not get an *additional* license for the branch office. In these circumstances the court said:

> "Literally, all that section 10136 requires is that the plaintiff prove 'that he was a duly licensed real estate broker.' There is literally no requirement in section 10136 that, as a prerequisite to the maintenance of his action, he prove that he had a branch office license for the branch office from which the services were performed or a fictitious name license authorizing the use of the fictitious name under which his services were performed."
>
> *Where the statute is not explicit, problems such as that now confronting us are to be resolved by reference to the statutory purpose.*" (19 Cal.App.3d at 292).

The statute *is* explicit in providing that a person or entity *must be licensed* in order to recover compensation. [Bus. & Prof. Code 10136). The Supreme Court in *Asdourian* took pains to point out that no separate

corporate entity was involved in that case. The Supreme Court stated (at pages 284-285):

> "In this case, plaintiff *obtained a license for his sole proprietorship under the name Artko.* Plaintiff's name was on the license as the responsible managing party. At the time the license was issued, he intended to incorporate Artko. *Had he done so Artko would have become an entity separate from plaintiff. However, the incorporation never took place,* and the business *remained a sole proprietorship.* Plaintiff was *personally responsible for all debts* and responsibilities incurred by the business, and *the assets of the business were plaintiff's assets. In essence, plaintiff was Artko.*"

And the court repeatedly emphasized that *Asdourian* did not involve a separate entity, but *merely a different name for the same sole proprietorship*; (at p. 288):

> *"This case is more similar to Schantz v. Ellsworth* (1971) 19 Cal.App.3d 289 [96 Cal.Rptr. 783]. In *Schantz*, the plaintiff was personally licensed as a real estate broker. He also *did business under the fictitious name* 'Investment Trends.'
>
> . . .
>
> The plaintiff in *Schantz* was allowed to bring an action under a contract made and performed *while using the fictitious name.* The Court of Appeal held that all section 10136 "literally" requires is proof that the plaintiff was a "duly licensed" real estate broker. Therefore, it "does not preclude maintenance of [an] action by one

> who holds a valid real estate broker's license but who has failed to obtain . . . *a license for the use of a fictitious name.*" (*Schantz, supra,* 19 Cal.App.3d at p. 288.)
>
> . . .
>
> The *Asdourian* court further stated:
>
> "*The policy considerations here are indistinguishable from those in Schantz.* Plaintiff obtained a license *under the name 'Artko'.* In connection with the issuance of that license, his qualifications were examined and approved. Although *he uses a different name* and should have obtained a separate license to comply with section 7028.5, his qualifications did not change, *nor did his status or form of his business.* He was *simply using a different name for the same sole proprietorship.*" (Id. at p. 288)

The Supreme Court's repeated emphasis on the fact that *Asdourian* did not involve a corporation, or any other change in the "status or form" of the business and its equating the case with *Schantz,* shows clearly that the Supreme Court recognized the distinction between a sole proprietorship using a mere fictitious name and the performance of services by a separate unlicensed corporation. Thus, the California court, in *Asdourian,* broke no new ground in holding that the plaintiff as owner of his sole proprietorship business and thus in fact licensed, could recover compensation. That is not, of course, the case before this court, where the out-of-state corporate plaintiff had no license.

Appellants vastly overstate and misinterpret the *Asdourian v. Araj* opinion, asserting that it "disapproved in all material respects" and "expressly disapproved the

holding in" *General Insurance v. Superior Court,* 26 Cal.App.3d 176, 102 Cal.Rptr. 541 (1972). Both assertions are mischaracterizations which reflect a misreading of the opinion. The opinion did chide the *General Insurance* court for relying on the dissent in *Latipac v. Superior Court,* 64 Cal. 2d 278, and noted that it "was not free to disregard" the rule announced by the majority. However, the *Asdourian* court carefully limited its treatment of *General Insurance* as disapproval only "*to the extent* that [it] rests on the logic of the *Latipac* dissent." (38 Cal.3d at 288). Contrary to appellants' assertions in their petition for rehearing, the holding in *General Insurance* was not disapproved, nor did the court modify its own opinion in *Lewis & Queen v N.M. Ball Sons,* 48 C 21 141, 150-151, relied on by *General Insurance*:

> "Section 7031 [10136] represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting [brokerage] business outweighs any harshness between the parties, and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of the state."

Indeed, *Asdourian* emphasizes that the purpose of enforcing the license law "is accomplished by denying . . . . access to the courts to recover for the fruits of [the unlicensed person's] labor . . . when he violates the statute." (39 Cal.3d at 282). As we read *Asdourian*, the court is saying that in limited and exceptional circumstances the court may consider whether the *Latipac* tests are met and the doctrine of substantial compliance applied. *That is precisely what the district court did in the case before this court.*

In its Memorandum of Decision and Order the lower court rejected defendants' argument that the substantial compliance doctrine could not be considered:

> "Defendants argue that the *General Insurance* case forecloses application of plaintiffs' substantial compliance theory in brokerage license cases also . . . Thus, *contrary to the assertions of defendants, General Insurance does not automatically foreclose plaintiffs' substantial compliance argument in brokerage licensing cases.*" (Appellants' Excerpts of Record Tab 41, pg. 9, ln. 3-18.)

Thus the lower court recognized the very principle urged by appellants. Then the court went on to find that the undisputed facts did not warrant application of the substantial compliance doctrine here. Thus, appellants were given full consideration of the very doctrine they now urge should have been considered.

Although appellants suggest that this court's Memorandum "misapprehended the legal effect of its determination", nothing in the court's Memorandum provides any basis for this misperception on the part of Appellants.

Finally, it is necessary to correct an erroneous statement of fact repeatedly asserted in the petition for rehearing. Appellants assert that Plehn "indisputably was the *only person* who performed the service of finding a mortgage lender for Imperial's real estate project" (Petn. pg. 5) and was "the only person physically performing services" (Petn. pg. 2). The declarations filed by plaintiffs in this case at a time when they were showing the importance of the corporation's role include the declaration of Richard M. Staff, executive vice-president of the unlicensed New York corporation, Richard A.

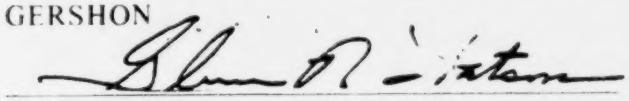
Plehn, Inc.. That declaration states under penalty of perjury that Executive Vice-President Staff met with Imperial's board chairman in New York on June 2 , 1982 and discussed the proposed Metropolitan Life financing of the proposed construction on Imperial's property. (Clerk's Record, docket item 10, Tab 10, page 31.) Thus, appellants' assertions are contrary to their own sworn evidence which stands undisputed in the record. The unlicensed corporation clearly acted through someone else in addition to Mr. Plehn.

CONCLUSION

Appellants' have striven mightily to justify a rehearing but have fallen short of the mark. Neither the record nor the recent California Supreme Court decision supports their contentions. The lower court carefully considered the substantial compliance doctrine and found that this case fails to meet the requirements for its application. The petition for rehearing should be denied.

Dated: April 24, 1985

GLENN R. WATSON
ARNOLD SIMON
RICHARDS, WATSON, DREYFUSS & GERSHON



UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD A. PLEHN INC., and RICHARD A. PLEHN, Plaintiffs and Appellants,	CASE NO. 84-5905 DC NO. CV 83-678 RJK (GX)
IMPERIAL BANCORP, and IMPERIAL BANK, Defendants and Appellees.	NOTICE OF MOTION AND MOTION TO FILE REPLY TO DEFENDANTS' ANSWER TO PETITION FOR REHEARING; MEMORANDUM OF POINTS AND AUTHORITIES AND DECLARATION OF ROBERT P. MALLORY IN SUPPORT THEREOF; REPLY TO DEFENDANTS' ANSWER (ATTACHED)

PETTIT & MARTIN
ROBERT P. MALLORY
PETER M. BRANSTEN
2049 Century Park East
Suite 2150
Los Angeles, California 90067
(213) 553-2145

Attorneys for Plaintiffs and Appellants

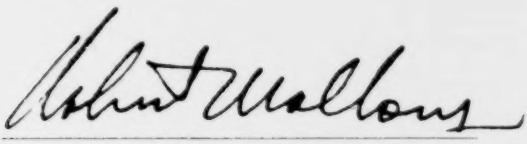
TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

Plaintiffs-Appellants, Richard A. Plehn and Richard A. Plehn, Inc. hereby respectfully move this Court for an order granting leave to file a reply to Defendants' answer to Plaintiffs' petition for rehearing.

This motion is made pursuant to Federal Rules of Appellate Procedure, Rule 27(a), and the verbal instructions of the Clerk for the United States Court of Appeals for the Ninth Circuit; and will be based upon this notice of motion and motion, the attached memorandum of points and authorities, the declaration of Robert P. Mallory and upon all the pleadings, briefs and papers in the Court's file.

DATED: April 30, 1985

PETTIT & MARTIN
ROBERT P. MALLORY
PETER M. BRANSTEN

By: 

Robert P. Mallory
Attorneys for Plaintiffs and
Appellants

MEMORANDUM OF POINTS AND AUTHORITIES

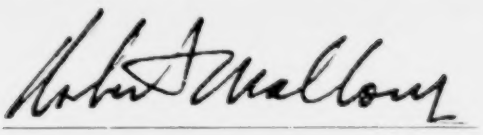
On April 15, 1985, Plaintiffs filed a petition for rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure on the grounds that a recent decision of the California Supreme Court, *Asdourian v. Araj*, ___ Cal.3d ___, 211 Cal. Rptr. 703 (1985), compels reversal of the district court's entry of a summary judgment in this action. On or about April 24, 1985, Defendants filed a motion for leave to file an answer to Plaintiffs' petition for rehearing and concurrently lodged an answer to the petition under separate cover. Defendants should not have lodged their answer until their motion had been granted. Rule 40(a) of the Federal Rules of Appellate Procedure explicitly states: "[n]o answer to a petition for rehearing will be received unless requested by the court . . . ."

However, Plaintiffs do not oppose Defendants' motion. They merely wish to preserve their right to reply to Defendants' answer, in which Defendants contend that the Supreme Court's decision in *Asdourian* is distinguishable from this case. Defendants impart significance to the fact that *Asdourian* involved a sole proprietorship and not a privately held, closed corporation. In their reply, a copy of which is attached, Plaintiffs conclusively demonstrate by reference to the California Supreme Court's decision in *Latipac, Inc. v. Superior Court*, 64 Cal. 2d 278, 49 Cal. Rptr. 676 (1966), which was the basis of the Court's decision in *Asdourian*, that this distinction has no significance whatsoever.

Plaintiffs were instructed by the Clerk of this Court that filing this motion, and attached reply, was the appropriate procedure to respond to Defendants' answer.

DATED: April 30, 1985

PETTIT & MARTIN
ROBERT P. MALLORY
PETER M. BRANSTEN

By: 

Robert P. Mallory
Attorneys for Plaintiffs and
Appellants

IT IS HEREBY ORDERED that the motion of Plaintiffs and appellants for leave to file a reply to Defendants' answer to petition for rehearing is granted and that the reply to the answer, attached hereto, is accepted for filing.

DATED: _____

_____

Circuit Judge

DECLARATION OF ROBERT P. MALLORY

I, Robert P. Mallory, do hereby declare:

1. I am an attorney duly admitted to practice in all the courts in California, including this Court. I am a member of Pettit & Martin, attorneys of record for Plaintiffs herein. Except as otherwise indicated, I have personal knowledge of the matters set forth below and, if called as a witness, could and would competently testify thereto.

2. On April 25, 1985 I received Defendants' motion for leave to file an answer to Plaintiffs' petition for rehearing and also Defendants' answer to petition, served under separate cover.

3. At my instruction, my associate Peter M. Bransten contacted the Clerk of the United State Court of Appeals for the Ninth Circuit to inquire about the proper procedure to file a reply to the Defendants' answer to the petition. Mr. Bransten was instructed by the Clerk to file a motion for leave to file a reply to the answer with the reply brief attached.

4. Plaintiffs' reply addresses the contention in Defendants' answer that *Asdourian v. Araj*, ___ Cal.3d ___, 211 Cal. Rptr. 703 (1985), is distinguishable from this case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 30, 1985 at Los Angeles, California.

Robert P. Mallory

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD A. PLEHN INC., and RICHARD A. PLEHN, Plaintiffs and Appellants, IMPERIAL BANCORP, and IMPERIAL BANK, Defendants and Appellees.	CASE NO. 84-5905 DC NO. CV 83-678 RJK (GX)

REPLY TO DEFENDANTS' (APPELLEES') ANSWER TO PETITION FOR REHEARING

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Attorneys for Plaintiffs and Appellants

MEMORANDUM OF POINTS AND AUTHORITIES

Defendants' answer to Plaintiffs' petition for rehearing is significant not because of what it contains, but rather because of what it omits.

I.

APPARENTLY DEFENDANTS HAVE CONCEDED THAT THE POLICY UNDERLYING CALIFORNIA'S BROKER LICENSING LAW, AS ARTICULATED BY THE CALIFORNIA SUPREME COURT, HAS BEEN MET

Defendants do not even attempt to demonstrate that the policy of California's real estate broker licensing law was somehow violated or disserved in this case, as required under the California Supreme Court's decision in *Asdourian v. Araj*, ___ Cal. 3d ___, 211 Cal. Rptr. 703 (1985). Defendants do not assert that they were in fact denied the full protection of the licensing statute—or even articulate a theory to suggest how they might have been denied such protection. Instead, Defendants continue to avoid this fundamental issue, and to rely entirely on their argument that (for some unstated reason) Plehn Inc.'s status as a *corporation* necessarily precludes application of the substantial compliance doctrine. No matter how creative this argument may be, it is not supported by California law; it is contrary to the concept of substantial compliance; and is fundamentally illogical.

II.

APPLICATION OF THE SUBSTANTIAL COMPLIANCE DOCTRINE DOES NOT TURN UPON THE "FORM" OF UNLICENSED ENTITY INVOLVED

The doctrine of substantial compliance is not foreclosed where the unlicensed entity in a transaction is a corporation. The Supreme Court's decision in *Latipac, Inc. v. Superior Court*, 64 C. 2d 278, 49 Cal. Rptr. 676 (1966), which provided the foundation for its recent decision in *Asdourian, supra*, makes this clear. In *Latipac* the plaintiff, a *corporation* named "J.W. Lee & Co.," brought an action to recover for labor and materials furnished to defendant pursuant to a contract. The record disclosed that J.W. Lee & Co. was not licensed as a contractor for almost a one year period of time during which the contract was partially performed and completed. *Latipac, supra*, 64 Cal. 2d at 285. However, throughout the period of the contract, valid licenses existed in the names of *other* corporations through which the managing officer of J.W. Lee & Co. ("J.W. Lee") operated. *Id.* These other corporations had obtained their licenses based on the confirmed qualifications of J.W. Lee. On these facts the California Supreme Court reasoned that the policy of the contractor's licensing statute was satisfied:

> Plaintiffs' "responsible managing officer" is J.W. Lee. It is by virtue of Mr. Lee's qualifications that plaintiff secured and holds its contractor's license. Mr. Lee and his associates conduct their affairs through a number of related corporations. The qualifications of Mr. Lee form the basis for the licenses of a number of these corporations. One of them, San Leandro Rock Co., possessed a

> valid contractor's license throughout the period that plaintiff was performing its contract with defendant. The existence of this license necessarily evidences an official determination of the experience and competence of Mr. Lee, the same experience and competence which would have been in issue in a consideration of plaintiffs' application for renewal of its license. This official confirmation of Mr. Lee's qualifications *throughout the period of performance* should exorcise any remaining doubt that the policy of the statute has been satisfied in this case.

Id. at 285-286 (emphasis in original).

Latipac immediately and unequivocally reveals that the doctrine of substantial compliance is not precluded simply because the unlicensed entity is a corporation. To the contrary, the *Latipac* test for substantial compliance expressly *assumes* such a situation. As the Supreme Court stated in *Asdourian*, the third factor of the *Latipac* test "requires official confirmation of 'the responsibility and competence of plaintiff's managing officer . . . . throughout the period of performance of the contract.' " *Asdourian, supra,* 211 Cal. Rptr. at 709, quoting *Latipac, supra,* 64 Cal. 2d at p. 282. Clearly the term "managing officer" pertains to a corporation, not a mere fictitious business name or sole proprietorship. If the Supreme Court in *Asdourian* had meant to exclude corporations from the doctrine of substantial compliance it would not have expressly quoted this language from *Latipac*.

In sum, to resolve the issue of substantial compliance it is irrelevant whether the unlicensed entity is a corporation (*Latipac, supra*); a sole proprietorship

(*Asdourian, supra*) a partnership (*Heinfelt v. Arth,* 135 Cal. App. 445, 27 P.2d 420 (1933)); an unspecified fictitious business entity (*In re Estate of Baldwin,* 34 Cal. App. 3d 596, 110 Cal. Rptr. 189 (1973)); or a "dba" (*Schantz v. Ellsworth,* 19 Cal. App. 3d 289, 96 Cal. Rptr. 783 (1973)). The question in all such cases is whether the policy of the licensing statute has been served. *Asdourian, supra,* 211 Cal. Rptr. at pp. 709-711. Plaintiffs have established and Defendants do not deny that such policy was served in this case.

Moreover, there is no rational basis for distinguishing between an unlicensed corporation and an unlicensed "dba" in applying the substantial compliance doctrine where the purpose of the license statute has been satisfied. Under the California real estate license law the existence of a valid license issued to an individual is the basis on which a license is issued to a business entity, whether that entity is a corporation or a fictitious name. Business & Professions Code § 10150 *et seq.* In either situation the license is issued to the business entity as a matter of course.

III.
THE SUBSTANTIAL COMPLIANCE DOCTRINE DOES NOT REQUIRE THAT THE LICENSED PARTY ACT ALONE

As a parting shot, Defendants attempt to resurrect the assertion that Plaintiffs have contradicted their sworn testimony. (Answer, p. 10.) This is not so. Plaintiffs contend that Richard Plehn was the only individual engaged in the activity of *finding a mortgage lender* for Imperial's real estate project. Nothing in the record, including the declaration of Richard M. Staff, controverts this contention. It is obvious that Defendants themselves accord little significance to their single

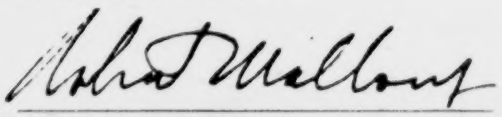
contact with an employee of Plehn, Inc. other than Mr. Plehn, since they completely ignored it until now. Moreover, nowhere is it revealed in the substantial compliance cases that if the licensed individual receives assistance from an employee, the doctrine no longer applies. Under *Asdourian* the central prong of the test for substantial compliance is whether the responsibility and competence of the "managing officer" of the unlicensed entity were officially confirmed throughout the period of contract performance. This is indisputably the situation here, where Richard Plehn—himself licensed—wholly owns and manages the unlicensed corporation.

IV.
CONCLUSION

The law in California is clear that the doctrine of substantial compliance applies whether the unlicensed entity in a transaction is a corporation, a partnership, a sole proprietorship or a "dba." Defendants' efforts to distinguish *Asdourian* must be rejected. The doctrine applies under the facts before this Court, and the case should be remanded for trial.

DATED: April 30, 1985

PETTIT & MARTIN
ROBERT P. MALLORY
PETER M. BRANSTEN

By: 

Robert P. Mallory
Attorneys for Plaintiffs and
Appellants

August 16, 1985

Clerk, United States Court of Appeals
P. O. Box 547
San Francisco, California 94101

Re: *Richard A. Plehn Inc., etc. vs. Imperial Bancorp, etc.*
CA No. 84-5905

Dear Sir/Madam:

On April 16, 1985 plaintiffs and appellants Richard A. Plehn Inc. and Richard A. Plehn filed a petition for rehearing by the panel in the above-referenced action on the ground that the California Supreme Court's decision in *Asdourian v. Araj*, ___ Cal.3d ___, 211 Cal. Rptr. 703 (1985), decided after oral argument and before the Court's Memorandum was filed, compels a reversal of the trial court's entry of a summary judgment. This petition is currently pending before the Court.

On July 25, 1985 another California Supreme Court decision was issued which, like *Asdourian*, has a material impact on the issues in this appeal. In *Tenzer v. Superscope*, 85 D.A.R. 2661 (1985), a copy of which is attached, the Supreme Court ruled that the plaintiff could maintain a claim for fraud regardless of whether the statute of frauds rendered his oral contract with the defendant unenforceable and reversed the trial court's entry of a summary judgment. The Supreme Court's decision vacates the decision of the Court of Appeals in *Tenzer v. Superscope, Inc.*, 48 Cal. App. 3d 430, 195 Cal. Rptr. 881 (1983) which was cited by defendants and appellees on pages 30 and 31 of their brief and in the Court's Memorandum dated April 2, 1985 on page 3. Appellants respectfully submit that the Supreme Court's decision in *Tenzer* supports their argument at

pages 30 through 35 of their opening brief. Appellants' desire to bring this precedent, which invalidates authority expressly relied upon by the panel, to the attention of Justice Jerome Farris, Justice Betty B. Fletcher and Justice Mary M. Schroeder and hereby submit the original and three copies of this letter for presentation to the panel in accordance with Rule 1 of the Rules of the United States Court of Appeal for the Ninth Circuit.

Sincerely yours,

Peter M. Bransten

PMB:lm

Attachment

cc: Glenn R. Watson, Esq.

September 11, 1985

Ms. Kathy Catterson
Acting Clerk, United States Court of Appeals
P.O. Box 547
San Francisco, California 94101

Re: Richard A. Plehn, Inc., etc. et al
vs. Imperial Bancorp, etc. et al
No. 84-5905

Dear Ms. Catterson:

Peter M. Bransten, Esq., of Petit & Martin, attorneys for plaintiffs/appellants, directed a letter to you dated August 16, 1985 attaching a copy of the California Supreme Court's opinion in *Tenzer v. Superscope, Inc.*, 39 Cal.3d 18 (1985), and requested that this case be brought to the attention of Judges Schroeder, Fletcher and Farris. Certain comments in the letter require a response.

Counsels' August 16, 1985 letter says that plaintiffs'/appellants' petition for rehearing currently pending before the court is on the ground that the California Supreme Court decision in *Asdourian v. Araj*, 38 Cal.3d 276 (1985) compels a reversal. Defendants'/appellees' motion for leave to file an answer to the petition for rehearing also pending before the court, and the proposed answer lodged with the motion, point out that the *Asdourian* decision does not detract from the validity of the trial court's judgment or this court's affirmance of the judgment and does not warrant a rehearing.

Tenzer v. Superscope, Inc. supra, now cited by plaintiffs/appellants, unlike the case at bench, is a Statute of Frauds case in which the court considered whether pleading estoppel or fraud could get around the requirement of a writing. In the case at bench the

Statute of Frauds is not involved, but rather an illegal contract by an unlicensed person in violation of the real estate brokers' licensing law. In such a case, the licensing statute can not be thwarted by pleading estoppel or other theory of relief (Business & Professions Code 10136); *Wise v. Rados,* 74 Cal. App.765 (1925); *Fewel & Dawes, Inc. v. Pratt,* 17 Cal.2d 85 (1941); *Franklin v. Nat C. Goldstone Agency* 33 Cal.2d 628 (1929). The correctness of the judgment in the case at bench is not affected by its reference to the earlier state court of appeal opinion in *Tenzer v. Superscope, Inc.* 48 Cal.App.3d 430.

It is requested that if plaintiffs'/appellants' counsel's letter of August 16, 1985 is brought to the attention of Judge Schroeder, Judge Fletcher and Judge Farris, that this letter also be brought to their attention if it is not inappropriate to do so.

Respectfully,

Glenn R. Watson

GRW:lat

cc: Peter M. Bransten, Esq.

APPENDIX B

California Civil Code §1624:

The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent:

(a) An agreement that by its terms is not to be performed within a year from the making thereof.

(b) A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in Section 2794.

(c) An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; such an agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged.

(d) An agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate, or to lease real estate for a longer period than one year, or to procure, introduce, or find a purchaser or seller of real estate or a lessee or lessor of real estate where the lease is for a longer period than one year, for compensation or a commission.

(e) An agreement which by its terms is not to be performed during the lifetime of the promisor.

(f) An agreement by a purchaser of real property to pay an indebtedness secured by a mortgage or deed of trust upon the property purchased, unless assumption of the indebtedness by the purchaser is specifically provided for in the conveyance of the property.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on January 31, 1986, I served the within ***Brief in Opposition to Petition for Writ of Certiorari*** in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Pettit & Martin
Robert P. Mallory
Peter M. Bransten
2049 Century Park East
Suite 2150
Los Angeles, California 90067

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 31, 1986, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)

Supreme Court, U.S.
FILED
FEB 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1121

In the Supreme Court of the United States

October Term, 1985

RICHARD A. PLEHN, INC., and RICHARD A. PLEHN,

Petitioners,

v.

IMPERIAL BANCORP, and IMPERIAL BANK,

Respondents.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RICHARD A. PLEHN, INC.,
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No. 85-1121

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October Term, 1985

RICHARD A. PLEHN, INC., and RICHARD A. PLEHN,

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v.

IMPERIAL BANCORP, and IMPERIAL BANK,

Respondents.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

As they have during the entire course of this appeal, Imperial Bancorp and Imperial Bank ("Imperial") continue to avoid the pivotal question which controls application of the substantial compliance doctrine, namely: was the purpose of California's real estate broker licensing statute served in this transaction. Imperial does not assert it was ever exposed to the perils of dealing with incompetent or untrustworthy brokers or in some other way denied the full protection of the licensing statute. Nor does Imperial even theorize as to how the purpose of the licensing statute might have been disserved in this case. Instead, Imperial wholeheartedly endorses the Ninth Circuit's conclusion that the style of the

transaction ("co-brokered" by Richard Plehn and Plehn, Inc.) necessarily forecloses the substantial compliance doctrine. This mechanical analysis ignores the purpose of the substantial compliance doctrine, is not supported by any applicable California decisions and is totally irreconcilable with the principles set forth in *Asdourian v. Araj*, 38 Cal. 3d 276, 696 P.2d 95, 211 Cal. Rptr. 703 (1985).

ARGUMENT

1. The Fact That Richard Plehn Acted As A "Co-Broker" In This Transaction With Plehn, Inc. Does Not Foreclose Application Of The Substantial Compliance Doctrine.

In utter disregard of the reasoning in *Asdourian v. Araj*, Imperial maintains that the mere *form* of the transaction controls the question of substantial compliance. Imperial quotes extensively various portions of the record indicating that Richard Plehn, the individual, co-brokered this transaction with his New York corporation, Plehn, Inc. [Imperial's opposition brief, pp. 9-12.] The purpose of these quotations is a mystery. Petitioners have never denied that Plehn acted as a co-broker with Plehn, Inc. and expressly acknowledged this fact in their petition to this Court. [Petition, p. 7.] Nor have petitioners ever stated that they should be viewed as a "single person" for purposes of the licensing law as Imperial falsely asserts. Rather, what petitioners have consistently maintained is that the services provided by the individual, Plehn, and the corporation, Plehn, Inc., were exactly the same insofar as only Plehn, the individual, who wholly owns and controls the corporation, was physically expending time and energy to locate a mortgage lender and joint venture partner for Imperial's project.[1] The question is whether a finding of substantial compliance must be made on these facts. The answer, as a matter of law, is yes.

---

[1]Imperial asserts that Plehn, Inc. operated through the efforts of another individual besides Richard Plehn in this transaction. Despite the existence of seven depositions in this case which

Asdourian prescribes the following test for determining whether the doctrine of substantial compliance is applicable in a given fact situation: "(1) [whether] . . . plaintiff held a valid license at the time of contracting, (2) [whether] . . . plaintiff readily secured a renewal of that license, and (3) [whether] . . . the responsibility and competence of

---

represent over 1600 pages of testimony the only evidence Imperial cites in support of this contention is a one page declaration by Richard Staff submitted by petitioners early in this litigation when the District Court's diversity jurisdiction was in issue. The substantive portion of this declaration states *in full:*

> 2. I have never been employed by Richard A. Plehn, Inc., a California corporation.
>
> 3. On approximately June 22, 1982 I met with George M. Eltinge of the Board of Imperial Bancorp, over breakfast at the Helmsley Palace Hotel. Among other things, during the course of that meeting I discussed with Mr. Eltinge its joint venture between Imperial and Metropolitan Life Insurance Company regarding improvement of Imperial's Wilshire and Figueroa property in Los Angeles, California.

[C.R., D. 10, tab. 10, p. 31.]

The declarant, Richard Staff, performs purely routine administrative functions for Plehn, Inc. and was not in any way engaged in the process of locating a mortgage lender and joint venture partner for Imperial's office project. These facts are not in the record only because Imperial never even mentioned its single contact with an employee of Plehn, Inc. until this case was already on appeal. What facts are in the record (declaration above) in no way indicate that Mr. Staff performed brokerage services. Therefore, if there is a genuine factual question as to whether any natural person other than Richard Plehn was acting on behalf of Plehn, Inc. in finding a mortgage lender for Imperial, then summary judgment should have been denied. *Free v. Bland,* 369 U.S. 663, 671 (1962).

Moreover, under *Asdourian,* the relevant inquiry is whether the responsibility and competence of the "managing officer" of the unlicensed entity were officially confirmed throughout the period of contract performance. *Asdourian,* 38 Cal. 3d at 286. This is indisputably the situation here, since Richard Plehn, a licensed California real estate broker, wholly owns and manages Plehn, Inc.

plaintiff's managing officer were officially confirmed throughout the period of performance of the contract." 38 Cal. 3d at 284. Petitioners demonstrated in their petition that under the Supreme Court's analysis in *Asdourian*, these criteria are satisfied in this case. Imperial makes no attempt to argue otherwise in its opposition. Instead, Imperial struggles to avoid addressing the test on its merits by attempting to distinguish *Asdourian* on the ground that the case involved a sole proprietorship and not a corporation.

Imperial ignores the fact that the very test applied by the Supreme Court in *Asdourian* was originally developed by the Supreme Court in *Latipac, Inc. v. Superior Court*, 64 Cal. 2d 278, 411 P.2d 564, 49 Cal. Rptr. 676 (1966), a case which directly involved an *unlicensed corporation*. In *Latipac* the plaintiff, a *corporation* named "J.W. Lee & Co.," brought an action to recover for labor and materials furnished to defendant pursuant to a contract. The record disclosed that J.W. Lee & Co. was not licensed as a contractor for almost a one year period of time during which the contract was partially performed and completed. 64 Cal. 2d at 285. However, throughout the period of performance of the contract, valid licenses existed in the names of *other* corporations through which the managing officer of J.W. Lee & Co., ("J.W. Lee") operated. *Id.* These other corporations had obtained their licenses based on the confirmed qualifications of J.W. Lee. On these facts the California Supreme Court reasoned that the policy of the contractor's licensing statute was satisfied:

> Plaintiff's "responsible managing officer" is Mr. J.W. Lee. It is by virtue of Mr. Lee's qualifications that plaintiff secured and holds its contractor's license. Mr. Lee and his associates conduct their affairs through a number of related corporations. The qualifications of Mr. Lee form the basis for the licenses of a number of these corporations. One of them, San Leandro Rock Co., possessed a valid contractor's license throughout the period that

> plaintiff was performing its contract with defendant. The existence of this license necessarily evidences an official determination of the experience and competence of Mr. Lee, the same experience and competence which would have been in issue in a consideration of plaintiff's application for renewal of its license. This official confirmation of Mr. Lee's qualifications *throughout the period of performance* should exorcise any remaining doubt that the policy of the statute has been satisfied in this case.

Id. at 285-286 (emphasis in original).

Significantly, in *Knapp Development & Design* v. *Pal-Mal Properties, Ltd.*, 173 Cal. App. 3d 423, 219 Cal. Rptr. 44 (1985) the Court of Appeal rejected the very argument Imperial asserts here—that the principles of *Asdourian* apply only to a sole proprietorship and not a corporation:

> While *Asdourian* involved an individual and a sole proprietorship and the instant case involves an individual and a corporation, that distinction does not compel a different result here. As previously noted, when examining the third *Latipac* factor, where there has been official confirmation of the responsibility and competence of plaintiff's managing officer, no distinction is made on the question whether the entity holding the license is legally liable on the contract.

Id. at 435.

Imperial attempts to distinguish *Knapp* on the ground that the unlicensed corporate entity and the other party to the construction agreement in issue were controlled by the same person. Contrary to Imperial's assertion the Court never stated or even implied that this fact was essential to its finding of substantial compliance. The Court took note of this fact only *after* it concluded that the third factor of the *Latipac* test (confirmation of the responsibility and competence of

the plaintiff's managing officer) was satisfied. 173 Cal. App. 3d at 435. The Court thus suggested that this fact constituted an *additional* but not a necessary basis for its finding of substantial compliance.

Moreover, as in *Knapp*, circumstances exist in this case which support application of the substantial compliance doctrine independent of the fact that the *Latipac* criteria are satisfied. The record discloses that "Richard A. Plehn and Richard A. Plehn, Inc., a New York corporation, had had prior similar dealings with George M. Eltinge and George Graziado [officers of Imperial] as individuals and partners, in which the plaintiffs [petitioners here] were compensated in a similar manner for similar services rendered." [E.R., t. 32, last exhibit, p. 9, lines 18-23; quoted by Imperial on p. 10 of its opposition brief.] Surely these facts dispel any possible complaint by Imperial about Richard Plehn's capabilities as a real estate broker.

In re Estate of Baldwin, 34 Cal. App. 3d 596, 110 Cal. Rptr. 689 (1973) also confirms that a corporate plaintiff may invoke the doctrine of substantial compliance. The doctrine was held applicable in *Baldwin* because of the trial court's finding that it was through the efforts of the licensed manager of the *unlicensed corporation* that the brokerage work was performed. *Baldwin*, 34 Cal. App. 3d at 602. The identical facts are present here.

Finally, despite the fact that *General Insurance v. Superior Court*, 26 Cal. App. 3d 176, 102 Cal. Rptr 541 (1972) involved an unlicensed corporation the decision was disapproved by the Supreme Court in *Asdourian*. If the Supreme Court had meant to preserve the integrity of *General Insurance* on the ground that the unlicensed entity was a corporation it could easily have said so. Instead, the Supreme Court clearly indicated that in *General Insurance*, the Court of Appeal should have weighed equitable considerations when examining the licensing issue. 38 Cal. 3d at 287-288. Imperial asserts that the Supreme Court merely "chided" the Court in *General Insurance*. Whatever Imperial means by this

ambiguous assertion, it is beyond question that the decision no longer supports Imperial's original contention that the doctrine of substantial compliance is inapplicable under the facts of this case.

Imperial also contends that Plehn, Inc.'s failure to maintain an office in California precludes application of the substantial compliance doctrine. [Imperial's brief, p. 16.] Here again Imperial seizes upon non-substantive matters in attempting to avoid the principles of *Asdourian*. It is undisputed that Richard Plehn maintains a business officer in California as required by the real estate broker licensing statute. The *Latipac* criteria cannot be disregarded on the facile grounds proposed by Imperial.

The decisive question in all cases which address the issue of substantial compliance including *Asdourian v. Araj*, *Latipac, Inc. v. Superior Court*, *In re Estate of Baldwin*, *Knapp Development & Design v. Pal-Mal Properties, Ltd.*, and *Schantz v. Ellsworth*, 19 Cal. App. 3d 289, 96 Cal. Rptr. 783 (1971) is whether, regardless of the form of the transaction, the purpose of the licensing law is satisfied. *Asdourian* prescribes an approach to this question which was completely ignored by the Ninth Circuit. There is absolutely no indication in the record that the Court of Appeals considered the *Latipac* criteria or that it weighed equitable considerations as mandated by *Asdourian*.

While petitioners acknowledge that this Court will not ordinarily grant certiorari to review a decision of a Circuit Court interpreting state law, where, as in this case, the Circuit Court has obviously disregarded controlling authorities decided by the state's highest court, this Court's exercise of its supervisory power is warranted. *Huddleston v. Dwyer*, 322 U.S. 232 (1944). Petitioners seek no more from this Court than an order directing the Ninth Circuit to consider and apply the principles announced by the California Supreme Court in *Asdourian* and *Tenzer v. Superscope*, 39 Cal. 3d 18, 216 Cal. Rptr. 130 (1985).[2]

[2]Imperial's assertion that petitioners "fail to mention" in their

2. As Imperial Itself Admitted Below, *Tenzer v. Superscope* Is Controlling Authority In This Case.

Imperial disingenuously asserts that *Tenzer v. Superscope* has no application to this matter because the action on the contract was barred under the statute of frauds and not a licensing statute. Imperial neglects to mention that it cited and relied extensively on the vacated decision of the Court of Appeal in *Tenzer* in its Motion for Summary Judgment [E.R., t. 32, pp. 32, 33] and in its brief to the Ninth Circuit [Appellee's Brief, p. 30]. If Imperial truly believed that the circumstances involved in *Tenzer* did not provide a valid basis for resolving petitioner's fraud claim, why did it state the exact opposite below?

Nothing in the *Tenzer* opinion remotely supports Imperial's contention that the holding has no application outside the context of the statute of frauds. To the contrary, the rule of *Tenzer* applies in any situation where a claim on the contract is barred by operation of law. This is clear from the California Supreme Court's statement of the rationale underlying its holding: "[r]ather 'something more than nonperformance is required to prove the defendants' intent *not to perform his promise.*' [Citations omitted.]" 39 Cal. 3d at 30 (emphasis added).

Imperial's contention that *Tenzer v. Superscope* does not apply because the contract is "illegal" under Business & Professions Code §10139 is patently erroneous. In *Norwood v. Judd*, 93 Cal. App. 2d 276, 209 P.2d 24 (1949) the Court of Appeal ruled that a licensed contractor could bring an action in equity for dissolution of a partnership and for an accounting notwithstanding that the partnership had never secured a license and thus had operated "illegally." *Norwood*

Petition to this Court that *Asdourian* and *Tenzer* were brought to the Ninth Circuit's attention (Imperial's Brief, p. 3) is false. This fact was clearly disclosed in the Petition (pp. 3-4), and formed the basis for petitioners' reliance on *Huddleston v. Dwyer*.

involved a statute analogous to §10139 which provided: "Any person who acts in the capacity of a contractor without a license . . . is guilty of a misdemeanor." *Norwood,* 93 Cal. App. 2d at 281, quoting former Business & Professions Code §7030. Notwithstanding this statute the court permitted recovery, stating:

> The rule that the courts will not lend their aid to the enforcement of an illegal agreement or one against public policy is fundamentally sound. . . . But the courts should not be so enamored with the Latin phrase "in pari delicto" that they blindly extend the rule to every case where illegality appears somewhere in the transaction. The fundamental purpose of the rule must always be kept in mind, and the realities of the situation must be considered. Where, by applying the rule, the public cannot be protected because the transaction has been completed, where no serious moral turpitude is involved, where the defendant is the one guilty of the greatest moral fault, and where to apply the rule will be to permit the defendant to be unjustly enriched at the expense of the plaintiff, the rule should not be applied.

Id. at 288-289. As *Norwood* reveals, even if petitioners' contract claim is barred, Business & Professions Code §10139 does not prevent petitioners from invoking the rule of *Tenzer* to recover on their claim for fraud.

Finally, Imperial's contention that "the California Supreme Court in *Tenzer* made clear that its holding even as to the statute of frauds only applied to finders, and not to brokers" [Imperial's Brief, p. 22] is utterly false. The very case disapproved by the Supreme Court in *Tenzer, Kroger v. Baur,* 46 Cal. App. 2d 801, 117 P.2d 50 (1941), involved a suit by real estate *broker* not a finder.

CONCLUSION

Imperial fails to demonstrate that the Ninth Circuit properly considered and applied controlling authorities decided by the California Supreme Court while this case was sub judice. This Court should direct the Ninth Circuit to do so.

DATED: February 13, 1986

Respectfully submitted,

PETTIT & MARTIN
ROBERT P. MALLORY
PETER M. BRANSTEN
355 South Grand Avenue
Thirty-Third Floor
Los Angeles, California 90071
Attorneys for Petitioners

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on February 13, 1986, I served the within *Reply to Opposition to Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Richards, Watson, Dreyfuss
& Gershon
Glenn Watson, Esq.
333 S. Hope Street
38th Floor
Los Angeles, California 90071

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 13, 1986, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)